LASCELLES
ON
HORSE WARRANTY.

SECOND EDITION

5/-

HORSE WARRANTY.

THE LAW

RELATING TO THE

PURCHASE, SALE, LETTING AND HIRING OF HORSES,

AND THE

RIGHTS AND LIABILITIES OF INNKEEPERS, LIVERY STABLE KEEPERS AND OTHERS, USING HORSES,

WITH HINTS AS TO PROCEDURE IN

CASES OF DISPUTE.

BY

FRANCIS HENRY LASCELLES, LL.B.,

OF TRINITY HALL, CAMBRIDGE,

AND OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

"Tu qui cæteris cavere didicisti, in Britannia ne ab essedariis decipiaris caveto."—
Cic., Ep. Lib., 7 *Ep.* 6.

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PREFACE

TO THE SECOND EDITION.

In submitting another Edition of this little Work to the public, I have added somewhat to the law points, of value to the trade called "Horse Dealing," and, at the same time, I have tried to retain a more simple phraseology than is usually found in Law Books. The chief object of my endeavours has been to supply Buyers and Sellers and Users of Horses, as well as Lawyers, with some rules for their guidance. The latter, however, can always find access, in works especially devoted to contracts, to more complete treatises on the law, than I can hope to give in so small a publication.

F. H. L.

November, 1880.

PREFACE

TO THE FIRST EDITION.

Professional circumstances have required me during the last few years to see and hear a great deal of litigation in what are called "Horse Cases." In that experience I have known many transactions in which the aggrieved party, on appealing to Law, has not been successful; and where the want of success has been attributed to defects in the tribunal appealed to, whereas, in fact, the blame should have been laid on the carelessness or ignorance of the complainant in the transaction under dispute. For this reason, partly, I venture to submit the following pages to the public. They are not intended for a Law Book, nor will they supply the place of business habits, or turn a careless deal or bargain into a satisfactory one; but I hope they will show those who propose to buy or sell a horse some of the rules and safeguards to be adopted to avoid litigation, if possible, or to ensure success if litigation must take place.

The ownership of a good many horses, both in India and in this country, must be my apology for some statements which are the result of experience.

Temple, *May* 1*st*, 1877.

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HORSE WARRANTY.

CHAPTER I.

THE PURCHASE OR SALE OF HORSES.

Strange as it may appear to some persons, a sale of any article, especially of horses, is often not so plain and simple a thing as is generally supposed. In Great Britain we have, by various statutes and decisions, arrived at what a sale is or should be; but this is not so in all places. Great Britain has numerous possessions, and the same law of contract does not prevail everywhere. Law books, written in England, are greedily bought up and studied, when often the English law does not apply, and mistakes occur, not because the text-book is wrong, but because the English law of contracts is not the law of the locality. The British possessions in East India are now almost wholly supplied with horses from Australia, and everything sounding in contract in India is governed by the Indian Contract Act. Much, therefore, of the law on horses, contained in English law books, is of no use to an Australian horse

dealer in India; at the same time so difficult is it to apply a statute or a code to all cases of contract, that even in India, constant reference is made to English precedents, and with great advantage, for nowhere in the world is justice so well administered as in Great Britain, or in such faith and good conscience.

Blackstone defines "A bargain and sale of goods," which is the common law term for a sale of personal property, to be "a transmutation of property from one man to another, in consideration of some price." By some price is meant some equivalent in money. An exchange of a horse, for so many cows or sheep, is not a sale. Farmers call it a swop; by law it is called a barter. In this short Work it is proposed to treat of the sale of horses for money. A sale may take place under one of two forms or methods:— One where the seller, suppose a dealer, takes a colt to a fair; the buyer comes up and, after bargaining about the price, pays the money without any stipulation, and leads the horse away by the halter. Dealers call this an *out and out* sale. The other form, and the more usual one, is where the sale and purchase is not then and there finally completed, but after the bargain is made something more remains to be done.

This form of bargain and sale lawyers call "an executory contract." To effect a valid bargain and sale at common law, all that was necessary

was, that the parties contracting were competent to do so; that they mutually assented to the contract; and that some price in money was paid or promised to be paid. Considerable modifications, both in the common law form of bargain and sales and in executory contracts, were effected by the Statute of Frauds, 29 Car. 2, c. 3, and the act amending it, 9 Geo. 4, c. 7.

CHAPTER II.

THE STATUTE OF FRAUDS.

The Statute of Frauds, as it is called, was passed in the reign of Charles II., for the purpose of preventing frauds and perjury. Its main requirement is, that in certain cases where bargains are made, to make the contract good, *i. e.*, binding, there should be some memorandum of the bargain in writing. The provisions of this Act have been almost everywhere adopted by the States of the American Union, and it needs only a short practice out of Great Britain,—for example, in the British possessions in East India, where there is no such law, and where parol evidence has almost become worthless through subornation,—to show the value of the enactment, and the wisdom of our forefathers in making it law.

As the object of this short Work is to treat of horses, and their purchase and sale, it will be sufficient to consider the effect of the 17th section of the Statute of Frauds, because that section relates to the sale of all articles, above the value of 10*l*. It is not probable that many horses, sold under that sum, will become subjects for litiga-

tion. The language of the 17th section is as follows:—

17th section of Statute of Frauds.

"And be it enacted that from and after the said four and twentieth day of June [A.D. 1677], no contract for the sale of any goods, wares or merchandize for the *price* of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

The word "price," mentioned in the original statute, should now be read "value." See 9 Geo. 4, c. 14, s. 7, and the decision in *Scott* v. *Eastern Counties Railway Company* (*a*).

On examining the above section, it will be seen that a contract for goods above the value of 10*l.* shall not be held to be good, except—

Requisites of 17th section of Statute of Frauds.

(1.) The buyer shall accept part of the goods so sold, and actually receive the same;

(2.) Or give something in earnest to bind the bargain, or in part payment;

(3.) Or that some note or memorandum in writing of the said bargain be made and

(*a*) 12 M. & W. 33.

signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized;

or, in other words, that one of these three exceptions shall be made a requisite, whenever there is a sale of an article, or a claim for the value of an article, above the value of ten pounds.

If, then, a dealer in horses, or any seller of a horse for more than ten pounds in value, does not satisfy one of these requisites, that is, does not see that the provisions of the three above-quoted exceptions have been fulfilled, he may find, that the purchaser can repudiate the bargain, and throw the horse back on his, the seller's, hands.

To aid sellers and buyers, it will be convenient to mention shortly the nature of each provision, and some of the leading cases on each point.

First requisite, acceptance and receipt.

The first exception or requisite noticed above is, that the buyer shall accept part of the goods sold, and actually receive the same, or, in other words, that there shall have been an acceptance and receipt of the horse (*b*). What does this mean? The general rule as to whether there has been an acceptance under the statute would appear to be the fact—"Has the seller so parted with the possession of the goods or article so as to lose his control over them;" for so long as a

(*b*) *Farina* v. *Horne*, 16 M. & W. 119; *Hunde* v. *Whitehouse*, 7 East, 558; *Baldey* v. *Parker*, 2 B. & C. 37.

seller can enforce his lien on the articles, it is clear that the buyer cannot have accepted and received them in a true sense.

An actual acceptance and receipt of a horse is not difficult to explain: as for instance, if the buyer lead the horse away, or give it in charge of his own servant, or send it to a livery stable to stand at the buyer's costs. This class of cases do not present much difficulty; but beside this, the acceptance of goods may be constructive and not actual. The question whether the facts proved amount to a constructive acceptance is "one of fact for the jury, not matter of law for the Court"(*c*).

Case of constructive acceptance.

Elmore v. *Stone* (*d*) has long been cited as a leading case on questions of constructive acceptance and receipt. There the plaintiff, a livery stable keeper and horse dealer, asked the defendant 180 guineas for two horses. The defendant at first refused to buy, but afterwards sent word that "the horses were his, but as he had neither servant nor stable, the plaintiff must keep them at livery for him." This the plaintiff did, and the defendant afterwards refused to take the horses and set up the Statute of Frauds. The Court, however, held, that the character of the seller had

(*c*) See Denman, C. J., in *Edan* v. *Dudfield*, 1 Q. B. 302.

(*d*) 1 Taunton, 458. See, too, *Blenkinsop* v. *Clayton*, 7 Taunton, 597.

changed. He had in fact become bailee of the horses for the buyer, and, as C. J. Mansfield remarked, "after the plaintiff had assented to keep the horses at livery, they would, on the decease of the defendant, have become general assets; and so, if he had become bankrupt, they would have gone to his assignees. The plaintiff could not have retained them, though he had not received the price." The ruling in *Elmore* v. *Stone* was followed by *Marvin* v. *Wallis* (*e*). There the jury found, that after the bargain was concluded, the vendor borrowed the horse for a short time, with the purchaser's consent, and the Queen's Bench held that there was a change in the character of the vendor from owner to bailee of the horse in question. On the other hand, it has been held that where the parties agreed that the bargain should be a ready-money transaction, no right of property passed until the money was paid. In *Tempest* v. *Fitzgerald* (*f*), the buyer of a horse in August, agreed to give forty-five guineas for the animal and to take it away in September. Admittedly, it was a ready-money deal. The buyer returned at the end of September, had the horse out, and tried it, and asked the plaintiff's son to keep the horse for another week. The son,

Where bargain is for ready money no acceptance until money paid.

(*e*) 6 E. & B. 726; 25 L. J., Q. B. 369. See also *Beaumont* v. *Brengin*, 5 C. B. 301.

(*f*) 3 B. & A. 680.

unwillingly, consented to do so, as a great favor, the buyer saying he would call and pay for it in a few days. The buyer did return on the 29th September, with the intention of paying for the horse, but the animal had died in the interval, and the defendant learning this, refused to pay. The seller thereupon brought his action, but was nonsuited on the grounds that there was "no receipt,"—the defendant acquired no property in the horse until the price was paid, and that there was no acceptance within the Statute of Frauds.

Again, it has been held, that where no time was specified for the payment, and no payment is made, no property passes. In *Carter* v. *Toussaint* (*g*), the plaintiffs, farriers, sold the defendant a race horse. No money was paid or time fixed for payment. The horse required firing, which was done in the defendant's presence, and after a time, by defendant's orders, the animal was turned out to grass. The entry of turning it out, however, was made in the sellers' name, in the park-keeper's books. After a time, the defendant refused to take the horse, and the sellers brought their action. They were nonsuited, on the ground that there had been no actual receipt, because the sellers were not bound to deliver the horse without payment, and from the circumstances they had never lost possession or control of the horse.

(*g*) 5 B. & A. 855.

Second requisite, payment of earnest.

The second exception or requisite, mentioned above, to satisfy the Statute of Frauds, is giving something in earnest, or in part payment. This, as a custom, prevails in many parts of Ireland, in the Isle of Man and parts of Scotland, and, locally, no bargain would be deemed complete without some such payment being made. The custom does not prevail so much in English fairs. The earnest should be some coin in current use, and the contract will be as valid, if ratified by a sixpence as by a sovereign. The coin, however, should be retained by the vendor.

Earnest must be some current coin.

There are two old cases in the reports on the point—*Bach* v. *Owen* (*h*) and *Goodall* v. *Skelton* (*i*). In the first of these cases, the earnest given was a halfpenny. The facts were as follows:—The plaintiff and defendant exchanged horses. It was agreed that the plaintiff should pay the defendant four guineas more on the 17th December following, and also that plaintiff should keep the colt, he was selling or exchanging, until September of the following year. The defendant, to make the contract binding, paid the plaintiff one halfpenny, as earnest of the bargain. It was held, that the payment of the halfpenny vested the property of the colt in the defendant. A pretended payment of the earnest will not do. In *Blenkinsop* v. *Clayton* (*k*), the purchaser of a horse drew the

(*h*) 5 T. R. 409. (*i*) 2 H. Bl. 316. (*k*) 7 Taunton, 597.

edge of a shilling on the palm of the hand of the seller, and then put the shilling back into his own pocket. This in many fairs is called "striking a bargain," but it is not a sufficient part payment to satisfy the Statute of Frauds.

Effect of giving earnest with a bargain.

It would appear that the true legal effect of giving and receiving earnest is, to afford conclusive evidence that a bargain was actually completed with mutual intention that it should bind both seller and buyer. In Sheppard's Touchstone we have this rule: "If one sell me his horse or anything for money . . . . and I give earnest money, albeit, if it be but a penny, to the seller . . . . there is a good bargain and sale of the thing to alter the property thereof."

Third requisite, signed memorandum or note.

The third exception is, that there must be some note or memorandum in writing of the contract. This note should contain the names of the parties contracting, and generally the terms upon which they contract, because the word "bargain" means the terms the parties mutually assent to, and the words of the statute require a note or memorandum "of the bargain" (*l*). The note need not contain the signature of both parties; but the names or descriptions of the parties to the contract should be shown (*m*).

(*l*) *Kenworthy* v. *Schofield*, 2 B. & C. 945; see *Sale* v. *Lambert*, L. R., 18 Eq. 1; *Potter* v. *Duffield*, L. R., 18 Eq. 4.

(*m*) *Champion* v. *Plummer*, 1 N. R. 252; *Williams* v. *Lake*, 29 L. J., Q. B. 1; 2 E. & E. 349.

It should be noted, that there is a considerable distinction between the 4th section and the 17th section of the Statute of Frauds. In *Sail* v. *Bourdillon* (*n*), the judges said: "The memorandum states all that was to be done by the person charged; and, according to *Egerton* v. *Mathews* (*o*), that is sufficient to satisfy the 17th section of the Statute of Frauds, though not to make a valid agreement in cases within the 4th section." A memorandum of a bargain is sufficient, although it only contain a proposal, if it can be proved by parol that such proposal was accepted (*p*).

If price agreed on, that should be mentioned in note.

If the price has been agreed upon, that should be mentioned in the note. In *Elmore* v. *Kingcote* (*q*), there had been a verbal sale of a horse for 200 guineas, and the plaintiff tried to prove his case, as within the statute, by producing a letter from the defendant in these words, "Mr. Kingcote begs to inform Mr. Elmore that if the horse can be proved to be five years old on the 13th of this month, he shall be most happy to take him, and if not most clearly proved, Mr. K. will most decidedly have nothing to do with him." This was held insufficient. The Court saying, "The price agreed to be paid constituted a material part of

(*n*) 26 L. J., C. P. 78; 1 C. B., N. S. 188.

(*o*) 6 East, 307.

(*p*) *Reuss* v. *Picksley*, L. R., 1 Exch. 342; 35 L. J., Exch. 218.

(*q*) 5 B. & C. 583; 8 D. & R. 343.

the bargain." When the price is not a material part of the bargain, as where a gentleman ordered a landaulet, in general terms, the Court held the writing contained *all that was agreed on* (*r*), and found for the coachmaker.

On this point, Mr. Benjamin in his work on Sales says, "So far as price is concerned, the rule of law is that where there is no actual agreement as to price, the note of the bargain is sufficient, even though silent as to the price, because the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price. But the law only does this in the absence of an agreement, and therefore, where the price is fixed by mutual consent, that price is part of the bargain, and must be shown in order to satisfy the statute; and finally, that parol evidence is admissible to show that a price was actually agreed on in order to establish the insufficiency of a memorandum which is silent as to price."

Sufficient note may be made by letters.

A correspondence between the parties that does not contain all the terms of the contract will not be held a sufficient note of the bargain (*s*); but, on the other hand, a sufficient note may be made by letters or other writings, if taken together they

(*r*) *Hoadly* v. *Maclaine*, 10 Bingham, 482.

(*s*) *Cooper* v. *Smith*, 15 East, 103; *Richards* v. *Potter*, 6 B. & C. 437; *Smith* v. *Surman*, 9 B. & C. 561; 4 M. & R. 455.

form a contract (*t*). It is not necessary that the whole note should be on one piece of paper, if the different parts can be shown to be the same contract (*u*). It was said above, that the memorandum or note contemplated by the 17th section of the Statute of Frauds should contain the names of the parties to the contract, but that it is not necessary that it should contain the signature of both parties. The party whose signature is required is *the party to be charged*. This is now settled by authority and practice (*w*). A mark made by a party as his signature is sufficient (*x*), or even if the party hold the top of a pen while another person writes his signature (*y*).

So, too, it has been held, that the signature may be in print or stamped, and in the body of the paper, or at the beginning, or at the end. The leading case on this is *Saunderson* v. *Jackson* (*z*).

(*t*) *Jackson* v. *Lowe*, 1 Bingham, 9; *Allen* v. *Bennett*, 3 Taunton, 169; *Cooper* v. *Hood*, 28 L. J., Ch. 212.

(*u*) *Archer* v. *Baynes*, 20 L. J., Ex. 54, and 5 Ex. 625; *Gibson* v. *Holland*, L. R., 1 C. P. 1.

(*w*) *Allen* v. *Bennett*, 3 Taunton, 169; *Thornton* v. *Kempster*, 5 Taunton, 786; *Laythoarp* v. *Bryant*, 2 Bingham, N. C. 735, and 3 Scott, 238.

(*x*) *Baker* v. *Dening*, 8 Ad. & E. 94.

(*y*) *Helsham* v. *Langley*, 11 L. J., Ch. 17.

(*z*) 2 B. & P. 238; *Knight* v. *Crockford*, 1 Esp. 190. See, also, *Schneider* v. *Norris*, 2 Maule & S. 286; *Johnson* v. *Dodgson*, 2 M. & W. 653.

There the printed heading of a bill, connected with a subsequent letter by defendant, was held to take the case out of the Statute of Frauds. If the party to be charged puts his initials to the note as signing it, such initialing is sufficient (*a*).

The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), has, by its 3rd section, somewhat extended the provisions of the 4th section of the Statute of Frauds. It is there provided that no special promise by one person to answer for the debt of another shall be void because the consideration for such promise does not appear in the writing—that is, in the note. If, then, a farmer in a fair signs a paper, as guarantee for a friend who is buying, the former may be bound by it, even if the amount is not mentioned in the paper.

Who is an agent within the Statute of Frauds.

The next point to consider is, who is the agent duly authorized to sign? If an agent be duly appointed or is recognized as such, no difficulty arises. Sometimes, however, the law implies agency; for instance, generally speaking, an auctioneer is the agent of both parties at a public sale for the purpose of signing. This has long been established as law (*b*); so, too, it has been held that

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(*a*) *Phillimore* v. *Barry*, 1 Camp. 513. See, also, Lord Westbury's remarks in *Caton* v. *Caton*, L. R., 2 H. L. 127, 143.

(*b*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *Hinde* v. *Whitehouse*, 7 East, 558; *Durrell* v. *Evans*, 31 L. J., Ex. 337.

the auctioneer's clerk may be the agent (*c*). "Where the bidder, that is, the person to be charged, by word or sign authorizes the auctioneer's clerk to sign on his behalf, he makes him his agent, although by general custom, the auctioneer's clerk would not be the bidder's agent" (*d*).

Summary of first exception in 17th section of Statute of Frauds.

The result of the English law on these points may be summed up thus:—If a dealer or farmer takes a horse into a fair, or sells it anywhere, say for 30*l.*, and the buyer after agreeing to the price, but without paying for the animal at the moment, hands the horse over to his own servant, or takes it to some stable to stand at his, the buyer's, expense, then the buyer has accepted and received the horse within the meaning of the Statute of Frauds, and the seller can sue for the price of the animal sold; but if no money passes upon the bargain, and the seller puts the horse back into his string of horses, or into his own stable, or a stable he hires, and nothing more is done, the seller can refuse to go on with the bargain, and the buyer can refuse to ratify his bargain or to take the horse.

Summary of second exception.

Again, if after the buyer and seller have bargained for the horse, and settled the price and terms, if the buyer gives the seller something in

(*c*) *Bird* v. *Boulter*, 4 B. & Ad. 443.

(*d*) By Blackburn, J., in *Pierce* v. *Corf*, L. R., 9 Q. B. 215.

earnest, say one shilling, and the seller puts the shilling into his pocket, either party can enforce the bargain. This method of ratifying a bargain is not uncommon in northern fairs, the shilling being spent in a glass or two of ale. Such spending will not invalidate the bargain, if the seller has appropriated the shilling, for of course he can use the shilling, after it has come into his possession, as he pleases.

Summary of third exception.

There remains the third and last exception to the Statute of Frauds, the note or memorandum of the bargain signed by the party to be charged. It is usual, nowadays, after a bargain has been struck about a horse, for some note to be taken, which mentions whether the horse is warranted or not. The subject of warranty is something quite apart from sales. A horse may be sold any number of times without warranty, and in fact horses are only occasionally warranted when sold, and in the case of hiring and letting, when horses are sometimes warranted to be free from disease and quiet for the purpose hired. A mere warranty note may not satisfy the Statute of Frauds. It may be that the note after sale is a receipt; if so, and it contained the names of the parties and the price, it would necessarily be a note within the meaning of the statute: but as the money would be paid before the receipt was given, the only questions that would probably arise between the parties would be questions on the warranty. Some-

times only a note or memorandum of warranty or sale, is given by the seller, the money to be sent next day or soon after. In this case dealers and farmers should remember that only the seller is bound, unless the buyer has taken actual possession of the horse or paid some earnest. The seller cannot draw back from his bargain, although the buyer can do so, because, as was above pointed out, it is the signature of the party to be charged that is wanting, and if the defaulter has not signed, you cannot charge him, that is, he cannot be sued and made to take the horse he has bargained for.

CHAPTER III.

SALES OF HORSES BY HORSEDEALERS, AUCTIONEERS, AND AGENTS, AND IN MARKET OVERT.

Who is a horse-dealer.

In treating of the sales mentioned at the head of this chapter, the first question for consideration is, what is a horse dealer? According to a legal decision which has been much discussed, a horse dealer is one, who in his trade "distributes horses" (*a*).

Dealing in horses on Sunday may be illegal.

The question is one of importance, because as Sunday is by no means an uncommon day for bargains to be made in horse flesh, and because it is established by law and practice, that horse-keepers cannot maintain an action upon the sale of a horse made by such horse dealer on a Sunday (*b*). The reason of this is that "the Act for the better Observation of the Lord's Day" (29 Car. 2, c. 7, s. 1), enacts, that no tradesman shall exercise his ordinary calling upon the Lord's day, and as the ordinary calling of a horse dealer is selling and bargaining about horses, a sale of a horse on a Sunday, or a contract made respecting one on that

(*a*) *Allen* v. *Sharpe*, 2 Ex. 352.
(*b*) *Fennell* v. *Ridler*, 5 B. & C. 406.

Cases where Sunday dealing upheld.

day, may be illegal. One of the first cases reported, that bears upon the point, occurred in 1808. There the sale of a horse on a Sunday, was held valid, because it was a sale by a horse auctioneer, and private, it being held that his ordinary calling was the public sale of horses (*c*).

The next reported case occurred in 1824; there again, a sale of a horse, with a warranty, on a Sunday, was held valid on two grounds,—one, that the sale was not completed on the Sunday; the other, that it was not competent for the defendant to set up his own guilty act in defence (*d*).

In the last case mentioned, there was no question about the warranty being given and that the warranty was bad, but the defendant objected that the plaintiff could not recover in his action, because he the defendant was a horsedealer, and the warranty was given on a Sunday. The learned judge overruled the objection, and the plaintiff obtained a verdict for the price he had paid for the horse. Upon the defendant moving the King's Bench, the Court discharged the rule, saying,—"In this case there was no note in writing of the bargain, and on the Sunday all rested in parol, and nothing was done to bind the bargain. The contract therefore was not valid, until the horse was delivered to, and accepted by the defendant.

(*c*) *Drury* v. *Defontaine*, 1 Taunt. 131.
(*d*) *Bloxsome* v. *Williams*, 3 B. & C. 232.

The terms on which the sale was afterwards to take place were only specified on the Sunday, and these terms were incorporated in the sale made on a subsequent day." This case was in the Common Pleas.

However, in 1826, another horse case, *Fennell* v. *Ridler* (*e*), was decided in the same Court and by the same judges. The plaintiffs were horse dealers, and the horse was bought by them, and a warranty given, on a Sunday. The horse not answering its warranty, the plaintiffs brought their action, but were nonsuited. On moving the Court, the plaintiffs were again unsuccessful, the judges saying that they had not put a sufficiently broad construction on the Sunday Observance Act, in *Bloxsome* v. *Williams*, and that they now had come to the opinion, that the act was intended to regulate private conduct as well as to enforce public decency.

Cases where Sunday dealing held illegal.

In 1827, another case came before the Court of Common Pleas (*f*), which is useful to horse dealers, because the judges doubted the decision of their own Court in *Bloxsome* v. *Williams*, referred to above, and warmly eulogised the decision in *Fennell* v. *Ridler*.

It should be noted that the 29 Car. 2, c. 7, does

(*e*) 5 B. & Cr. 406. See also *Williams* v. *Paul*, 6 Bing. 653; and *Simpson* v. *Nicholls*, 3 M. & W. 240.

(*f*) *Smith* v. *Sparrow*, 4 Bing. 84.

not make every work or business done on the Lord's day illegal, but only carrying on a person's trade and ordinary calling on that day. So in *Scarfe* v. *Morgan* (*g*), the defendant pleaded illegality under the statute, against a farmer for the service of a stallion in covering the defendant's mare on a Sunday, but the defence was overruled. So also a contract made by a farmer on a Sunday, for hire of a labourer to attend on a horse, is not illegal (*h*).

Horsedealers, then, and farmers who are in the habit of selling horses, should be cautious how they deal in them on Sundays. If they bought, or sold, or entered into some contract about a horse on a Sunday with some one not in the trade, it may happen, that the latter may repudiate the contract, and put the person in the trade to great trouble and needless expense. At the same time, it must be remembered, that a person not in the horse trade cannot sue a horse dealer on a contract made on Sunday respecting horses, if such person knew that the horse dealer carried on that trade. The above quoted case, *Smith* v. *Sparrow* (*i*), is also useful in showing that if a contract is made by an agent, and the objection is taken by the party at

(*g*) 4 M. & W. 270.

(*h*) *R.* v. *Whitnash*, 7 B. & C. 596; *Bigbie* v. *Lee*, 1 C. & J. 180; 1 Tyrwhitt, 150. See *Beaumont* v. *Brengin*, 5 C. B. 301.

(*i*) 4 Bingham, 84.

whose request it was entered into on the Sunday, it cannot be enforced.

An auctioneer may be the agent of both buyer and seller within the Statute of Frauds.

It has before been shown that an auctioneer is the agent of both parties to sign the memorandum or note contemplated by the Statute of Frauds, and that he is, generally speaking, the agent of both seller and buyer (*k*), but this depends somewhat on the facts of each particular case (*l*). Thus, where the sale is at a private place—there the auctioneer is the agent of the seller only, and this may be of consequence on the point, who is to receive the purchase money (*m*). Also, wherever the place may be at which the sale takes place, the auctioneer only becomes agent for the purchaser when the contract is complete by the hammer being knocked down (*n*), until then he is agent for the seller only.

No contract final until the fall of hammer.

In *Payne* v. *Cave* (*o*) it was held that a bidder may at an auction retract his bidding any time before the hammer is down. The Court said, "Every bidding is nothing more than an offer on one side, which is not binding on either side until it is assented to" (*n*).

(*k*) *Kenworthy* v. *Schofield*, 2 B. & C. 945; *Emmerson* v. *Heelis*, 2 Taunton, 38.

(*l*) *Bartlett* v. *Purnell*, 4 Ad. & E. 792.

(*m*) *Mews* v. *Carr*, 26 L. J., Ex. 39; 1 H. & N. 484.

(*n*) *Warlow* v. *Harrison*, 28 L. J., Q. B. 18; 1 E. & E. 295.

(*o*) 3 T. R. 148. See also *Head* v. *Diggon*, 3 M. & R. 97; also *B. Tel. Co.* v. *Colson*, L. R., 6 Ex. 108; and L. R., 7 Ch. App. 587; *Cooke* v. *Oxley*, 3 T. R. 148; *Rutledge* v. *Grant*, 4 Bing. 653.

It is not absolutely necessary to give a written authority to an auctioneer to sell or to complete the contract on behalf of buyer and seller (*p*), however desirable it may be to do so. An authority may be implied from the act of the party, although no authority was ever given, as when the owner of a horse sends it to a common repository for the sale of horses, the owner would be bound by the sale of the animal, if made to a *bonâ fide* purchaser, even without his express consent. An authority to sell would be presumed from the act of sending the horse to the repository (*q*).

The possession of a horse at a public place like a repository is in the auctioneer, and he makes the contract and can maintain an action on it. Where, however, goods or horses are sold at a private place, as is sometimes the case now with hunters and race-horses, it is doubtful whether the auctioneer has such an interest in the things sold as to recover the price; as per Wilson, J., in *Williams* v. *Millington* (*r*). However, in that case, Lord Loughborough said, "An auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody, like a servant or shopman. There is no difference, whether the sale

(*p*) *Acebal* v. *Levy*, 10 Bing. 376.

(*q*) *Pickering* v. *Busk*, 15 East, 38—43; *Dyer* v. *Pearson*, 3 B. & C. 42; *Williams* v. *Barton*, 3 Bing. 139.

(*r*) 1 H. Bl. 81. But see *Mews* v. *Carr*, 26 L. J., Ex. 39; 1 H. & N. 484.

be on the premises of the owner, or at a public auction room, for on the premises of the owner, an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him with a lien for the charges of the sale, the commission with the auction duty which he is bound to pay."

Auctioneer is sometimes stakeholder for buyer and seller.

The auctioneer at a repository may be, from the terms of the sale, a stake-holder between the owner of the horse sold and the purchaser, as, for instance, where a horse is sold at a repository, on the condition, that if it does not answer the warranty or guarantee given with the animal, it may be returned within a certain time. Until that time has elapsed, the money paid by the buyer does not vest in the seller, but should be held and retained by the auctioneer (*s*). Where an auctioneer is employed to sell horses for ready money, he is the agent of the seller to receive the money (*t*), unless the conditions of sale point out that the money should be paid otherwise.

Fraudulent statements by auctioneer may vitiate a sale.

A statement by an auctioneer, that the horse put up for sale belongs to the person whose property he is advertised as selling, when in fact the

(*s*) *Hardingham* v. *Allen*, 5 C. B. 793.

(*t*) *Capel* v. *Thornton*, 3 C. & P. 352; *Sykes* v. *Giles*, 5 M. & W. 645.

animal belonged to another stud or to some other person, would vitiate the sale. See Lord Mansfield's remarks in *Bexwell* v. *Christie* (*u*), where the horses offered at auction were described as "the goods of a gentleman, deceased, and sold by order of his executors," and such not being the fact, the sale was declared fraudulent. In the same case it was held to be fraudulent for the seller to bid by himself or by his agent, the published conditions being "that the highest bidder shall be the purchaser, and if a dispute arise to be decided by a majority of the persons present."

Puffing at sales of horses by auction is illegal. If the buyer finds it out, the seller cannot recover the price (*x*).

Puffing at horse auctions is illegal.

The point was considered in *Crowder* v. *Austin* (*y*). Plaintiff brought an action to recover the value of a horse sold by him to the defendant at Aldridge's Repository. One of the conditions of the sale was "that each horse should be sold to the highest bidder." But as a fact, the plaintiff's groom attended the sale, and in his master's interest ran the horse up from 12*l.* to 23*l.*, at which price it was knocked down to the defendant. The defendant, the buyer, found this out, and refused

(*u*) 1 Cowper, 395. See also *Hill* v. *Gray*, 1 Stark. 434.
(*x*) *Pilmore* v. *Hood*, 5 Bingham, N. C. 97.
(*y*) 3 Bingham, 368.

to take the horse. C. J. Best nonsuited the plaintiff, and the ruling of the Chief Justice was confirmed by the Court of Common Pleas. Mr. Justice Park said, "I entirely concur in the opinion expressed by Lord Mansfield that sales of this description are fraudulent and void." This was followed in *Howard* v. *Castle* (*z*), and again in *Thornett* v. *Haines* (*a*).

Auctioneers have a lien on the horse sold for their charges.

Auctioneers, as a rule, have an interest in the sales over which they preside, and consequently have a lien on the articles sold. In *Robinson* v. *Rutter* (*b*) it was held that an auctioneer had a lien on a horse for his commission and charge. If an auctioneer is instructed by the owner of a horse to make fraudulent representations respecting the animal, the owner cannot recover the purchase money (*c*). Where a horsedealer employed an auctioneer to sell a horse for him, and make certain representations which were fraudulent and untrue, and the fraud being discovered before the horse was taken away, the auctioneer returned the money to the purchaser. The horsedealer thereupon sued the auctioneer for the purchase money, but it was held that he could not recover, the

(*z*) 6 T. R. 634.

(*a*) 15 L. J., Exch. 230; and 15 M. & W. 367.

(*b*) 4 E. & B. 951; *Williams* v. *Millington*, 1 H. Bl. 81; *Grice* v. *Kendrick*, L. R., 5 Q. B. 340.

(*c*) *Murray* v. *Mann*, 2 Exch. 538; *Stevens* v. *Legh*, 2 C. L. R., Q. B. 251.

Court saying it would be a discredit to the law if the innocent agent of the plaintiff's fraud were bound to pay the money to him.

Market overt, what is.

As a general rule, a sale in a fair or market overt, is binding, not only between the parties, but also on all persons claiming any right of property in the thing sold. Market overt, in the country, is held on certain days provided by charter or prescription. In the City of London, every day except Sunday is market day. In the country, only the place or piece of land set apart by custom for the sale of goods, is market overt, and this does not include shops. In the City of London every shop is market overt for the particular goods the owner of the shop professes to sell. The ordinary rules as to the validity of sales in market overt are somewhat modified in relation to the sales of horses by statute. These animals can so easily be moved from one place to another after being stolen, that special provisions have been made by statute respecting sales of them.

The first statute was passed more than 300 years ago—in 1555, 2 & 3 P. & M. c. 7. Another statute—31 Eliz. c. 12 (1589)—also applies to this subject.

The statute of Phillip and Mary provides, amongst other things, that there shall be a certain place appointed and set out in all fairs and markets overt where horses are sold—that a tollkeeper shall be appointed to keep this place, from ten o'clock

in the morning until sunset; and that he shall take the tolls for all horses at that place and within those hours, and not otherwise; that the parties to the bargain shall be before him when he takes the toll; that he shall write in a book, to be kept for the purpose, the names, surnames and dwelling-places of the parties, and a full description of the animal sold. The horse is not to become the property of the buyer unless it is exposed for one hour at least at the place and within the hours specified, and unless the parties, *i. e.* the buyer and seller, bring the animal to the tollkeeper and have proper entries made in his book. The statute of Elizabeth requires the tollkeeper, or bookkeeper, to find out the christian name, surname and residence of the seller, or of a creditable surety—that these, or one of them, and the real price or value of the horse, are to be entered in the tollkeeper's book, or, in case of failure, the sale is to be void. The same statute makes provisions for the real owner recovering back his horse if it has been stolen. The provisions of these two statutes have so effectually stopped the mischief they were intended to prevent, that is, horse-stealing, that the cases on them of modern date are not of sufficient importance to quote.

It has been held (*d*) that a sale of a horse at a repository out of the City of London, is not a sale

(*d*) *Lee* v. *Bayes*, 18 C. B. 599.

in market overt, the Court deciding that "market overt is an 'open, public and legally constituted market.'" What is a properly constituted market was decided in the Common Pleas in 1858 (*e*). When a horse is sold at a repository, the printed conditions of sale, if suspended in front of or near the auctioneer, or pasted on the front of his box, form part of the contract of sale (*f*).

Buyers should remember that, by English law, a description is often not a warranty, but only a condition. On this Lord Abinger's remarks in *Chanter* v. *Hopkins*, p. 34, are of value to purchasers of horses.

(*e*) *Benjamin* v. *Andrews*, 5 C. B., N. S. 299; 27 L. J., M. C. 310.

(*f*) *Bywater* v. *Richardson*, 1 A. & E. 508; *Mesnard* v. *Aldridge*, 3 Esp. 271; *Buchanan* v. *Parnshaw*, 2 T. R. 745.

CHAPTER IV.

HORSE WARRANTY.

The purchase and sale of horses are matters so much mixed up with warranty, that it is necessary to warn the general reader, that in England "a warranty in the sale of goods is not one of the essential elements of the contract; for a sale is none the less complete and perfect in the absence of a warranty"(*a*). All, therefore, that has been said before respecting sales of horses may be understood, without there having been any sort of warranty. At the same time, the warranties out of which actions have most frequently arisen, have been those given on the sale of horses.

Sale may be without warranty.

Mr. Youatt, in his book on the Horse, says: "A man should have a more perfect knowledge of horses than falls to the lot of most men, and a perfect knowledge of the vendor too, who ventures to buy a horse without a warranty." A statement which experience shows to be very true.

And the reasons for this are clear. As the horse is the most useful of quadrupeds to man, so in proportion are the varied qualities necessary to its

(*a*) Benj. on Sales.

utility. To perform with ease the work required from it, a horse should be in good health, and free from imperfection in wind and limb; it should be docile and good tempered, and do its work quietly and steadily, and yet a horse may be bought perfect to all outward appearance, and still be found wanting, not only in one, but in all these qualities.

It is the requirements we ask from a horse which oblige us also to ask for a warranty or undertaking that it has them. A cow may be lame or blind, or, indeed, vicious, but still answer the purposes of a cow very well, and give milk all her life, and be good beef afterwards; the only qualification necessary being that she should be a good milker, and this can be ascertained pretty well by the appearance of the udder or other marks known to milkmen and graziers.

No outward appearances will betray many defects and imperfections in a horse. The best looking are often the veriest brutes, and the dullest and most stupid to all appearance, turn out to be the worst biters, or kickers, or jibbers in harness.

The uninitiated in horse flesh, then, will be wise if in buying a horse they use their best endeavours to obtain a warranty. What is a warranty? It may be said to be a guarantee or undertaking by the seller to the buyer, that the article sold does in reality correspond to the description given of it by the seller, before and at the time of sale; and such guarantee or undertaking may be made and

given either in writing or by word of mouth. No special form of words is necessary to create a warranty. This point was settled so long ago as Lord Holt's time (*a*). No special words necessary to create a warranty.

It is more prudent to have a written form of warranty, as the document prevents disputes respecting the exact words used.

A written form of warranty should be in some such words as these:—

"Received of Mr. Brown, of Polegate, the sum "of 40*l.* for a bay gelding, aged —, warranted "sound, free from vice, and quiet to ride and "drive. Form of warranty.

"JOHN SMITH.

"Lewes, Jan. 31st, 1877."

Such a warranty need not be written at the time the warranty is given, in fact, a written warranty is rarely penned until the money is paid, and is but a memorandum or reduction into writing of the terms of a preceding warranty. Such writing then becomes the warranty. It need not be stamped with an agreement stamp; it must have a receipt stamp; but requires no other (*b*). If the warranty is contained in a separate document from the written receipt, no stamp whatever is required on the warranty. Where a receipt in writing is No stamp necessary with a warranty.

(*a*) *Cross* v. *Gardner*, Carthew, 90; and see *Medina* v. *Stoughton*, 1 Lord Raymond, 593; Salkeld, 220.

(*b*) *Skime* v. *Elmore*, 2 Camp. 407, quoting *Browne* v. *Fry*.

taken for the price of the horse, and the writing contains no warranty, it was held in the case of *Allen* v. *Pink* (*c*), that the warranty could be proved by parol evidence.

There are certain things connected with a warranty to which the reader's attention should be particularly drawn, whether the warranty be in writing, as above, or otherwise.

Let us consider them in order.

First, that everything said respecting the horse or article sold, every statement as to its soundness or other qualities which the seller may make, and which the buyer relies on as a warranty, must be made before the bargain is closed, or, as lawyers would say, before the contract is complete. A little consideration will show the sense of this: the buyer has been induced to buy the horse by something the seller has said before he sold it; such saying may be the warranty the seller gave, or it may be a representation only, but at all events it was something *before* the actual sale (*d*). Anything the seller may have said after the sale is completed could not have induced the purchaser to buy, and is of no use to the buyer if he goes to law. It frequently happens that persons (not

Statements to constitute warranty must be before sale.

(*c*) 4 M. & W. 140.

(*d*) *Hopkins* v. *Tanqueray*, 15 C. B. 130; 23 L. J., C. P. 162. See remarks of Baron Martin in *Stuckley* v. *Bailey*, 1 H. & C. 416; 31 L. J., Ex. 483; *Camac* v. *Warriner*, 1 C. B. 356.

lawyers) hardly consider this; they quote all the seller or dealer says as he buttons up the cheque in his pocket, as if that could in any way be a warranty. Some dealers and horse-sellers say all sorts of things when copeing or selling a horse, but they confine themselves to puff, and never commit themselves to any statement of a fact as to the subject of the deal. It is not until the bargain is entirely over that they comfort the buyer by statements which he fondly looks upon as warranties, but which cannot be so considered (*e*). Care then should be taken by the buyer to have every statement he proposes to rely on made distinctly before the bargain is closed. It is sometimes difficult to say when this happens. Paying the money is not always the completion of the contract in a legal sense. There are many ways by which the final settlement is arrived at. In Wales and in many Western fairs, no bargain is considered final until both parties strike or clasp one another's hands firmly over their chaffer, and to a jury in those parts evidence of such a hand-shake would be conclusive that that was the moment the transaction became ratified: even supposing the money not to pass for a month, everything said respecting the horse that was bought and sold up to that moment would be evidence for a court of law, whereas any statements, subsequent to such hand-

(*e*) *Roscorla* v. *Thomas*, 3 Q. B. 234.

shaking, would probably be disregarded. In an action brought by a farmer against a cattle dealer, to recover the value of three oxen sold by the dealer to the farmer, and warranted free from disease, the fact to be ascertained was when the contract was complete. The cattle were sold in a fair, and no proof given of any previous complaint. They became afterwards afflicted with foot and mouth disease, and it was proved that they were put into a field on the afternoon of the fair with some Irish cattle, amongst whom that disease broke out. The plaintiff contended that as he paid for the beasts in the evening, not having time to look after them until then, that the warranty commenced from the time of payment, but, as it came out incidentally, that he had about twelve o'clock taken a pair of scissors out of his pocket and had marked the cattle by cutting marks on their hair, the jury stopped the case, and intimated that they considered that was the moment when the contract was completed, and found for the defendant. It is not easy to lay down when in every case the bargain is closed, but the principle is the same in all cases, and the rule should not be forgotten, which is this: that it is statements or writings made before the actual sale which are of value to the complaining party, and that anything said or written after the sale is of no use, unless some fresh consideration passes, when of course, that would be a new bargain. The con-

sideration, that is, the price or whatever is given, becomes exhausted by the transfer of the property, and a warranty given after that is void (*f*). If something new passes, that is, suppose a dealer chooses to warrant a horse, in consideration of another five pound note, then the warranty might relate back to the original bargain, but such new contracts are not often likely to happen.

Meaning of the words "warranted" and "sound."

Again, it may be noted, that in the example of a written warranty, given above, the words "warranted" and "sound" are used. These words are well known to dealers, and by a series of legal decisions have been given a distinct technical meaning (*g*). Still, they are not absolutely necessary, and as will be shown, a seller may warrant a horse to be sound without using them. Nay, a seller may never use the word "warrant" and even say, "I do not warrant, and will not," and yet be liable to an action for breach of warranty, if by saying so he misleads the buyer and induces him to buy, as if one said "I will not warrant the horse, but you may depend upon it he is sound." This is a warranty, and if the buyer can show he relied on this statement, and afterwards the horse turned out to have been faulty at the time of sale, and

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(*f*) *Roscorla* v. *Thomas*, 3 Q. B. 234.

(*g*) *Kiddell* v. *Burnard*, 9 M. & W. 668; and also *Holliday* v. *Morgan*, 1 E. & E. 1; 28 L. J., Q. B. 9; *Coates* v. *Stevens*, 2 Moo. & Rob. 157.

the seller knew it, the buyer could recover as for a breach of warranty.

Mr. Justice Buller says, in *Pasley* v. *Freeman* (*h*), "It was rightly held by Holt, Chief Justice, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear in evidence to have been so intended."

No particular form of words are necessary to constitute a warranty, nor need the word warrant, as was before observed, be used (*i*).

Whether or not a warranty is intended is a fact for the jury to decide, taking into consideration the whole circumstances of the case.

In *Power* v. *Barham* (*k*), which was an action for breach of a warranty of pictures, it was proved, amongst other things, that the defendant at the time of sale gave the following bill of parcels: "Four pictures of Venice, Canaletti, 160*l*." The judge left it to the jury, upon this and the rest of the evidence, whether the defendant had contracted that the pictures were those of the artist named, or whether his name had been used merely as matter of description or intimation of opinion. The jury found for the plaintiff, saying that the bill amounted to a warranty, and it was held, on a motion for a new trial, that the question had been

(*h*) 2 Smith, L. C. 7th ed. p. 72.

(*i*) *Jones* v. *Bright*, 5 Bing. 533.

(*k*) 4 Ad. & Ellis, 173. But see *Jendwine* v. *Slade*, 2 Esp. 572.

rightly left to the jury, and the verdict was not to be disturbed.

Different kinds of warranties.

Of Warranties there are several kinds. Warranties may be said to be *general*, as where the seller says, "I warrant the horse," or "The horse is sound;" and in such case the complainant need do is to prove that the horse was not sound when sold. Whether the seller knew of any unsoundness or not is immaterial, he is bound by the general statement he has made.

Qualified warranty.

A *qualified* warranty is where a seller says, "The horse is sound so far as I know." Here, if the buyer is dissatisfied, he must not only prove that the horse he has bought is unsound, but also that the seller knew it was unsound at the time of the sale.

In *Cave* v. *Coleman* (*l*), an assertion by the vendor "that the buyer might depend upon it the horse was perfectly quiet and free from vice," was held to be a warranty.

Instances of qualified warranty.

In *Wood* v. *Smith* (*m*), the seller, in reply to the buyer's question, said of the mare he was selling, "She is sound to the best of my knowledge," adding shortly afterwards, "I never warrant; I would not even warrant myself." It was proved that the defendant knew that the mare was un-

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(*l*) 3 Man. & R. 2; *Steward* v. *Coesvelt*, 1 C. & P. 23; and see *Garment* v. *Barrs*, 2 Esp. 672.

(*m*) 5 M. & R. 124.

sound. The case was tried at *Nisi Prius*, and afterwards came before the Court in *Banc*, and it was held that this was a qualified warranty—the qualification being the defendant's *knowledge*, which was proved, and that the plaintiff could therefore recover. This is not a satisfactory case, as a precedent, the question turning more on a point in the pleadings than on the general merits.

The following are instances of qualified warranty: In *Richardson* v. *Brown* (*n*), the following memo was given on a sale, "A gelding, five years old, it has been constantly driven in the plough—warranted." The Court held that the warranty extended to soundness of the animal only, and not to its drawing qualities. In another case, *Budd* v. *Fairmaner* (*o*), the sale warranty was in these words, "Received 10*l.* for a grey four year old colt, warranted sound in every respect." The warranty was held to be confined to the horse's soundness and not to the age. Again, in *Dickenson* v. *Gupp* (*p*), quoted in the above case of *Budd* v. *Fairmaner*, a warranty thus worded, "Received 100*l.* for a bay gelding, got by Cheshire Cheese, warranted sound," was held not to be a warranty of breed, but of soundness only.

Limited warranty.

A warranty is said to be *limited* when the time

(*n*) 1 Bingham, 344; see also *Jones* v. *Coxley*, 6 D. & R. 533; 4 B. & C. 445.

(*o*) 5 C. & P. 78; and 8 Bing. 48.

(*p*) H. T. 1821.

for which the seller warrants is specified, as where one says, "I will warrant the horse for four days." This is a common form of warranty at repositories and public sales, where the buyer is generally allowed a specified number of days to make his objections to the horse he has bought, and if he fails to do this, as a rule, he has no remedy if the horse turns out worthless.

Head v. *Tattersall*.

The case *Head* v. *Tattersall* (*q*), in which a condition of sale was to this effect: "Horses not answering the description must be returned before five o'clock on Wednesday evening next, otherwise the purchaser shall be obliged to keep the lot with all faults,"—should be perused as bearing upon the doctrine of a sale with a limited condition.

In that case it appears that before the horse was removed from the place of sale, the buyer was told by the person in charge of it that the warranty given was wrong, and at bar it was contended that the buyer's action in taking the horse away after hearing such a statement waived his right under the warranty; but the Court were unanimously of opinion that a mere loose statement made by the groom in charge of the horse was not tantamount to an explicit notice by the defendant that the warranty was a mistake.

Another important question was also then decided, viz.: as to whether the fact that the horse

(*q*) L. R., 7 Ex. 7.

received some injury when in the custody of the buyer deprived the latter of his right to return it. It was held that it did not. Baron Bramwell said, "It was quite true as a general proposition that a buyer cannot return a specific chattel except it be in the same state as when it was bought; but in such a case as the present, the rule must be qualified thus: the buyer must return the horse in the same condition as when he bought it, but subject to any of those incidents to which the horse might be liable either from its inherent nature or from the course of the exercise by the buyer of those rights over it which the contract gave. For example, suppose the horse when standing in the stable strained itself or injured a limb, that would not affect the right of return, although the horse would no longer be exactly in the same condition as before."

Effect of notice on board in auction room.

In *Bywater* v. *Richardson* (*r*), a notice painted on a board and fixed in a conspicuous position, and stating that any warranty of horses selling that day at a private sale was to remain in force only until twelve o'clock next day, was construed to mean that the seller was responsible only for such defects as were pointed out before that hour, although the unsoundness subsequently ascertained was of such a nature as would not be discovered within the twenty-four hours. So again in *Chap-*

(*r*) 1 Ad. & Ellis, 508.

man v. *Gwyther* (*s*), when a horse was warranted sound for one month, it was held that the complaint of unsoundness must be made within one month of the sale, and the vendor was held not liable for a defect which existed at the time of sale, but was not discovered until more than a month had elapsed.

A large horse dealer for many years never warranted horses, and never meant to do so, but finding that County Court juries would not believe he had not done so, now says, when asked if he warrants a horse, "You may take him as warranted for a week from to-day;" and he finds, although some horses are returned on his hands with a veterinary certificate of unsoundness, yet on the whole he is the gainer by obtaining better prices and avoiding litigation.

Special warranty, nature of.

There may also be a *special* warranty, as where the parties in buying and selling a horse discuss a certain defect in the animal of which they are cognizant, and the buyer requires a warranty from the seller holding the latter answerable against the defects which might be likely to proceed from the defect; such a warranty would be a *special* one. So, also, where the seller wishes to exempt himself from liability in respect of the unsoundness likely to arise from a known defect.

In *Chanter* v. *Hopkins* (*t*), the Court said: "If

(*s*) 1 L. R., Q. B. 463. (*t*) 4 M. & W. 406.

a party offered to sell me a horse of such a description as would suit my carriage, he could not fix on me the liability to pay for it unless it were a horse fit for the purpose it was wanted for; but if I describe it as a particular bay horse, in that case the contract is performed by his sending that horse." Again, where the seller represents the animal he is selling as suited for particular work: as for instance, that a horse is "a good drawer and pulls quietly in harness," this is a special warranty of being quiet in harness and pulling well there. The word "good" must mean good in all particulars (*u*); and the warranty is not satisfied by the horse being a good drawer only (*x*).

If a warranty is reduced to writing, the parties are bound by the writing; the Courts of law will not go outside the document, although a written warranty need not be formal, as in the example above, but may be given by a number of letters, or even by a buyer's letters (*y*).

In *Stuckley* v. *Bailey* (*z*), the evidence of the contract of the sale of a yacht consisted of a series of letters which were of an ambiguous character in their terms, and it was held that, assuming the assertions in the letters amounted to a warranty of certain parts of the vessel, it was competent to the

(*u*) *Colthard* v. *Puncheon*, 2 D. & R. 10.
(*x*) *Smith* v. *Parsons*, 8 C. & P. 199.
(*y*) *Pickering* v. *Dawson*, 4 Taun. 785.
(*z*) 31 L. J., Ex. 483.

defendant to prove all the surrounding circumstances and statements of the parties, as well after as before the letters, to show that a warranty was not contemplated between the parties, and by a parity of reasoning it may be said that parol evidence would be admitted to show that a warranty was intended by a number of documents.

In a Sussex County Court, a buyer once proved a warranty in this way—he sent his servant with a cheque and note to the seller, saying if the seller warranted the horse specified, as *sound*, he could retain the cheque and send the horse; but, if not, the cheque was to be returned. The seller kept the cheque and sent the horse. The horse was found to be blind, and returned; and though the seller tried to deny the warranty, the buyer succeeded in his action by producing a copy of his letter, which the seller admitted was correct.

Large price no proof of warranty.

A large price is no proof of warranty. Mr. Justice Grose, in the case of *Parkinson* v. *Lee* (*a*), referring to the controversy as to implied warranty before *Douglas's case*, said: "Before that time it was a current opinion that a large price given for a horse was tantamount to a warranty of soundness; but when that came to be sifted it was found to be so loose and unsatisfactory a ground of decision, that Lord Mansfield rejected it, and said,

(*a*) 2 East, 314. See also *Stuart* v. *Wilkins*, Douglas, 19; and *Kiddell* v. *Burnard*, 9 M. & W. 668.

'there must either be an express warranty of soundness or fraud in the seller to maintain an action.'"

It is now law, that a high price is not tantamount to an implied warranty.

Sometimes buyers of horses make mistakes, and suppose they have a warranty, because many dealers and others in selling a horse, make all sorts of statements which are only intended to be representations, and it becomes a question with a complainant who thinks he has been defrauded, to consider, were the words used only representations or warranties. If a seller says "I can fully recommend this horse," or "I would sell it to my dearest friend," although such language might induce a purchaser to buy, still those words do not amount to a warranty.

The distinction between a warranty and a mere representation made before the sale is pointed out in the notes to *Gorham* v. *Sweeting* (*b*), but it is not easy always to distinguish them.

In *Salmon* v. *Ward* (*c*), which was an action on the warranty of a horse, the principal evidence consisted of letters which had passed between the parties; the argument of the defendant was that the statements made respecting the horse in question were only representations and descriptions; C. J. Best, said: "The question is whether the jury and I can collect that a warranty took place;

(*b*) 2 Wms. Saunders, 200. (*c*) 2 C. & P. 211.

I quite agree that there is a difference between a warranty and a representation, because a representation must be known to be wrong. The plaintiff in his letter says 'you remember you represented the horse to be five years old,' to which the defendant answers 'the horse is as I represented it.'" The jury found for the plaintiff, saying there was a warranty.

Distinction between representation and warranty.

In *Hopkins* v. *Tanqueray* (*d*), a good illustration may be found of the distinction between a mere representation to induce a would-be purchaser to buy, and statements which form part of the contract, and are therefore warranties. There the plaintiff bought a horse, sold by auction at Tattersall's, and it was admitted that, at the time of the sale, no warranty was given. But it appeared that the day before the sale, while the plaintiff was examining the horse, the defendant came into the stable, and as they were acquainted, said to the plaintiff, "You have nothing to look for, I assure you he is perfectly sound in every respect," to which the plaintiff replied, "If you say so I am satisfied," and left off examining the horse. The horse turned out unsound, and the plaintiff brought his action on the supposed warranty. It was admitted that there was no fraud in the statement by the defendant. The judges unanimously ruled that there was no warranty, and that the antecedent representation formed no part of the contract.

(*d*) 15 C. B. 130; 23 L. J., C. P. 162.

No better test can be given of the fact whether statements are or are not a warranty than that given by Mr. Benjamin in his book before quoted. He says: "In determining whether it (that is, a warranty) was intended; a decisive test is, whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion or to exercise his judgment. In the former case there is a warranty, in the latter not."

Mere representation no warranty.

When a representation is made during the course of a dealing, which leads to a bargain, and such representation afterwards becomes an intrinsic part of the bargain, it constitutes a warranty; but a representation made by a seller to a buyer to induce the latter to buy, which however does not form any part of the contract, is not a warranty. No action will lie upon a misrepresentation only. The Exchequer Chamber said, in *Ormrod* v. *Huth* (*e*): "The rule which is to be derived from all the cases appears to us to be that where upon the sale of goods the purchaser is satisfied without requiring a warranty (which is matter for his own consideration) he cannot recover upon a mere representation of the quality by the seller, unless he can show that such representation was bottomed in fraud."

(*e*) 14 M. & W. 651.

Occasionally it happens that there is a misrepresentation of fact, which is perfectly innocent, both buyer and seller thinking that they are dealing about a sound horse, and yet being in error. In such case, if there is no warranty, the buyer must pay the whole price; but if there is a general warranty, he has a remedy, as the seller would be liable for the error, and not the buyer. See *Kennedy* v. *Panama Railway Company* (*f*), where Mr. Justice Blackburn said: "There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it might be rescinded on the ground that there is a difference in substance between the thing bargained for, and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration; for example, when a horse is bought under the belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was

Effect of innocent misrepresentation.

(*f*) L. R., 2 Q. B. 580.

induced by an honest misrepresentation as to its soundness, though it may be clear that both the vendor and purchaser thought they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty."

There may be a warranty of future soundness.

It was formerly supposed, that there could not be a warranty of future soundness, as that a horse should be sound a month after the bargain made, and so Blackstone says: "The warranty can only read to things in being at the time the warranty is made, and not to things *in futuro*, as that a horse is sound at the buying of him, not that he will be sound two years hence." The law is different now. Lord Mansfield in *Eden* v. *Parkinson* (*g*), says, in reply to this passage in Blackstone, "There is no doubt you may warrant a future event."

Hitherto the subject of warranting horses has been treated as one between the seller himself and the buyer, but, necessarily, sometimes a servant or agent is intrusted with the sale of a horse, and the buyer does not come into contact with the owner at all.

Warranty by agents.

The question then arises how far an agent or servant can bind his master or principal, and in what cases a warranty, given by such agent or servant, is sufficient to fix the principal or master

(*g*) 2 Douglas, 732.

with liability. Generally speaking, if an agent, such as an auctioneer, is employed for a particular purpose, he has no right to exceed his limited authority. He is, in fact, a special agent; in which case it mainly devolves upon those having any transactions with such agent, to ascertain what that agent's authority really is. In such a case the principal or real owner cannot be bound by any act of the agent, which is outside the authority given him. Any act, therefore, not expressly warranted by the terms of the authority, will have no binding effect on the principal unless, by necessary implication or inference, the limit of the authority covers the act. A servant is somewhat different; but, a servant authorized to sell a horse, cannot exchange him for another, but he must receive payment in money(*h*). So, again, if a servant of the owner of a horse is intrusted to sell a horse, the servant is not authorized to give a warranty binding upon his master; and in case a warranty is given by the servant, the onus of proving that it is within the authority conferred upon the servant is thrown upon the person who accepts such a warranty. Thus, where a horse was sold, and the seller's servant, on delivering the horse, was induced to sign a receipt for the money, and a warranty; it was held, the seller was not bound by the act of the servant, who had no au-

Servant selling horse no authority to warrant.

(*h*) *Alexander* v. *Gibson*, 2 Camp. 555.

thority to warrant (*i*). The power to give a warranty, however, might be frequently implied, wherever a general authority is given by a principal or master to an agent or servant; this includes a power to do all acts necessary to perform and carry out that, for which the general authority was given.

Servants no general authority to warrant.

In the case of *Alexander* v. *Gibson* (*j*), a servant, who was sent to sell a horse at a fair, and authorized to receive the price, gave a warranty that the horse was sound, without having any special authority to do so, but without any limitation of authority. It was held that the master was bound. Lord Ellenborough, in giving judgment, said: "If the servant was authorized to sell the horse and to receive the stipulated price, I think he was also authorized to give a warranty for soundness. It is now most usual on the sale of horses to require a warranty, and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority. This is the common and usual manner in which the business is done, and the agent must be taken to be vested with powers to transact the business with which he is intrusted in the usual manner." In this case, it is said that the master was a horse dealer, and that the ser-

(*i*) *Woodin* v. *Burford*, 2 C. & My. 391; 1 Tyr. 264.
(*j*) 2 Camp. 555. See also *Helyear* v. *Hawke*, 5 Esp. 71.

vant was in the habit of selling horses for his employer, and, as will be seen from the case of *Howard* v. *Sheward* (*k*), the law is more stringent against horse dealers than it is against private owners.

Where warranties are given by agents, without express authority to do so, the general rule is, "that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual" (*l*). The important judgment of Chief Justice Erle, in the case of *Brady* v. *Todd* (*m*), will throw much light on the point. In that case, the defendant was not a horse dealer, but a tradesman in London, having a farm in Essex. The plaintiff sent to him for a horse, and the defendant sent his farm bailiff with a horse with authority to sell, but no authority to warrant. Nevertheless, the bailiff warranted the horse to be sound and quiet in harness. The horse not being so, an action for breach of warranty was brought, and the plaintiff's contention was that "an authority to sell imports an authority to warrant." After referring to the earlier cases, and among others to that of *Fenn* v. *Harrison* (*n*), Chief Justice Erle said: "We understand these judges to

If buyer take warranty from servant onus that servant had principal's authority on buyer.

(*k*) L. R., 2 C. P. 150, and post, p. 55.
(*l*) Benj. on Sales, 2nd ed. p. 508.
(*m*) 9 C. B., N. S. 592; 29 L. J., C. P. 144.
(*n*) 3 T. R. 757.

Brady v. *Todd.*

refer to a general agent employed for his principal to carry on his business, that is, the business of horse dealing, in which case there would be by law the authority here contended for. . . . . But it is also contended that a special agent without any express authority, in fact, might have an authority by law to bind his principal, as where the principal holds out that the agent has such authority, and induces a party to deal with him on the faith that it is so. In such a case the principal is excluded from denying this authority as against the party who believed what was held out, and acted on it; but the facts do not bring the defendant within this rule. The main reliance was placed on the argument that an authority to sell is by implication an authority to do all that in the usual course of selling is required to complete a sale, and that the question of warranty is, in the usual course of a sale, required to be answered; and that, therefore, the defendant, by implication, gave to his bailiff an authority to answer that question, and to bind him by his answer. It was a part of this argument that an agent authorized to sell and deliver a horse is held out to the buyer as having authority to warrant. But on this point also the plaintiff has, in our judgment, failed. We are aware that the question of warranty frequently arises upon the sale of horses, but we are also aware that sales may be made without any warranty, or even an

inquiry about warranty. If we laid down for the first time that the servant of a private owner intrusted to sell and deliver a horse on one particular occasion is therefore by law authorized to bind his master by a warranty, we should establish a precedent of dangerous consequence. For the liability created by a warranty extending to unknown as well as known defects, is greater than is expected by persons inexperienced in law, and as everything said by the seller in bargaining may be evidence of warranty to the effect of what he said, an unguarded conversation with an illiterate man sent to deliver a horse may be found to have created a liability which would be a surprise equally to the servant and the master. We therefore hold that the buyer, taking a warranty from such an agent as was employed in this case, takes it at the risk of being able to prove that he had the principal's authority, and if there was no authority in fact, the law does not, in our opinion, create it from the circumstances. . . . . It is unnecessary to add, that if the seller should repudiate the warranty made by his agent, it follows that the sale would be void, there being no question raised on this point."

Howard v. *Sheward*.

This case was much commented on in *Howard* v. *Sheward* (*n*). There, the plaintiff being at a riding school, asked the proprietor "If he knew of a

(*n*) L. R., 2 C. P. 150.

horse that would be likely to suit him," and the brother of the defendant Sheward, a horse dealer, who happened to be present, and who occasionally acted in the sale of horses for the defendant, said "he thought the latter had one." The horse was brought to the riding school and ridden by the plaintiff; and the defendant's brother, in answer to questions as to the soundness of the animal, said, "I'll guarantee the horse is sound." The horse was then examined by a veterinary surgeon, and pronounced sound, and it was bought by the plaintiff for 31*l*. The horse, however, after trial, proving to be unsound, was sold by the plaintiff, and an action brought to recover the difference in the price. Erle, C. J., ruled that the brother, as servant of the defendant, a horse dealer, had authority to warrant, and the jury, finding he had done so and that there was a breach of the warranty, a verdict was entered for the plaintiff. Upon a new trial being moved for, it was refused, and the Court held that if the servant of a horse dealer gives a warranty, notwithstanding that he is expressly directed not to warrant, the master is bound; the reason being that in the ordinary course of business the servant enjoys a general authority to sell, and that such authority, unless notice is given to the contrary, implies the power to warrant.

In his judgment Mr. Justice Willes says, "It appeared that David Sheward (the defendant's

brother) had before occasionally assisted the defendant in the sale of horses. Is it then part of the business of a horse dealer to warrant horses which he sells? No doubt . . . . it was an ostensible authority, which could not be negatived by showing a secret understanding between the horse dealer and his servant that the latter was not to warrant. The case of *Brady* v. *Todd* sustains that proposition. The Court there declined to extend the rule to a single transaction of sale by the servant of a private individual, because in such a case the buyer has no right to presume any authority in the servant beyond that which is apparent on the particular occasion."

The judgment, however, of Mr. Justice Byles is so terse and clear, as reported, that it is given in full. After referring to the case of *Brady* v. *Todd* above quoted, he says: "The rule to be deduced from that case is this: if the servant of, or agent of, any private individual entrusted on one occasion to sell a horse—without authority from his master takes upon himself to warrant the soundness of the animal, the master is not bound; but if the servant of a horse dealer, or even one who only occasionally assists him in his business, being employed to sell, gives a warranty, the principal is bound, even though the agent or servant was expressly forbidden not to warrant. In such a case there is ostensible authority to do that which is usual in the conduct of the business of a horse dealer.

If servant of horse dealer or livery stable keeper warrants he binds his master.

The above cases may appear to be somewhat contradictory, and difficult questions might arise as to who is a horse dealer; but the general principle to be learned from them is that if the servant or agent of a horse dealer warrant, the master or principal is bound, even if he has told his servant or agent not to warrant. On the liability of the agent or servant of a dealer, Mr. Oliphant says, condensing the language of Mr. Justice Bayley (*o*), "If the servant of a horse dealer with express directions not to warrant, do warrant, the master is bound, because the servant having a general authority to sell is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed."

Where also a livery stable-keeper, having in his stables a horse for the purpose of sale, empowers his servant to sell it, but directs him not to give a warranty, and the servant does, nevertheless, warrant it, the master is liable on the ground that the servant, having a general authority to sell, the public cannot be supposed to be aware what transpired privately between the master and servant (*p*). In all these cases the sale was effected by the servant in the usual course of business, and it is necessary in such cases, if the master does not wish to be bound, to give intimation to those who deal with his servant. It is different where the

(*o*) *Pickering* v. *Busk*, 15 East, 45.

(*p*) *Penn* v. *Harrison*, 3 T. R. 757 and 760.

owner of a horse chooses to send a stranger with a horse to a fair, with express instructions not to warrant, for in that case the agent would be only agent for one occasion, and the buyer would have to ascertain whether the servant's authority was limited or not. It may then be taken that the principal or master is bound by a warranty given by his agent or servant in all cases where such agent or servant is his general agent to carry on his business, even when such warranty is given contrary to express directions from the master. On this point the dictum of Lord Abinger, in *Cornfoot* v. *Fowke* (*q*), may be quoted. "Put the ordinary case of a servant employed to sell a horse, but expressly forbidden to warrant him sound. Is it contended that the buyer, induced by the warranty to give ten times the price which he would have given for an unsound horse, when he discovers the horse to be unsound, is not entitled to rescind the contract? This would be to say that though the principal is not bound by the false representation of an agent yet he is entitled to take advantage of that false representation for the purpose of obtaining a contract beneficial to himself, which he could not have obtained without it."

Servant of private owner intrusted to sell horse has no implied authority to warrant.

Although the purpose of this chapter is to treat more particularly of warranty, still it should be remembered that a contract respecting a horse, as also any other contract, may be rescinded if either

(*q*) 6 M. & W. 358. See also *Steward* v. *Coesvelt*, 1 C. & P. 23.

Fraud vitiates all contracts.

party to the contract has been induced to enter into it by *fraud*, for fraud renders all contracts void, both at law and in equity. The English law does not attempt to define what fraud is, because fraud is in itself so manysided that it is almost impossible to do so, nor does the French law attempt a definition, although the civil code of France purports to define almost everything. Still it provides, Article 1116: "Fraud, 'le dol,' is a ground for avoiding a contract when the tricks, 'les manœuvres,' practised by one of the parties are such as to make it evident that without those tricks the other party would not have contracted."

A horse, then, may be sold without any warranty and the buyer return it, if there has been any fraud on the part of the seller in the transaction. Nor will such fraud, if perpetrated by only one person, be a criminal offence. In such case the fraud is a mere imposition, and the buyer must look out for himself, *R.* v. *Wheatley* (*r*). But where two or more persons combine together to cheat in the sale of a horse, it is a criminal offence, and renders such persons liable to be indicted for a conspiracy, *R.* v. *Sheppard* (*s*). But it must be shown that all the parties charged knew of the fraud, *R.* v. *Pywell* (*t*), also *R.* v. *Read* (*u*). So also it is a criminal offence for two or more persons to obtain money for a horse upon state-

Fraud by more than one is a conspiracy.

(*r*) 2 Burrell, 128.
(*s*) 9 C. & P. 121.
(*t*) 1 Starkie, N. P. C. 102.
(*u*) 6 Cox, C. C. 135.

ments, all of which are absolutely false, as where two defendants told the buyer that certain horses were then the property of a lady and had been ridden by a lady, and never belonged to a horse dealer, thereby inducing the buyer to purchase the horses for his daughter by statements not one of which were true, *R.* v. *Kenrick* (*x*). In former times, the method of obtaining a remedy in cases of breach of warranty, was by action of deceit. Much useful information, even for modern actions, may be gained by perusing chapter xv. Selwyn's Nisi Prius, vol. 1, 11th edition, p. 643, on Deceit. A mere naked lie is not actionable; the deceit that is actionable, though possibly not so common now by an action of deceit, is some lie or false statement made knowingly with a design to injure, cheat, or deceive another person; but on an action for a breach of a general warranty, it is not necessary to prove a knowingly false statement.

Sale of a horse "with all faults."

In selling horses it is not unusual, when doing so by auction or private sale, to state that they are sold "with all faults," or, "take him as he is, subject to a veterinary inspection." In such case the seller is not bound to point out or disclose defects in the horse. At one time it was supposed that the law was otherwise, but in *Baglehole* v. *Walter* (*y*), Lord Ellenborough, after refusing to subscribe to *Mellish* v. *Motteaux*, said "where an article is sold 'with all faults,' I think it is quite

(*x*) 5 Q. B. 49; 2 D. & M. 208. (*y*) 3 Camp. 156.

Baglehole v. Walter.

immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and throw upon him the burden of examining all faults, both secret and apparent. I may be possessed of a horse I know to have many faults, and I wish to get rid of him, for whatever sum he will fetch. I desire my servant to dispose of him, and instead of giving a warranty of soundness, to sell him 'with all faults.' Having thus laboriously freed myself from responsibility, am I to be liable, if it be afterwards discovered that the horse was unsound? Why did not the purchaser examine him in the market, when exposed for sale? By acceding to buy the horse with all faults, he takes upon himself the risk of latent or secret faults, and calculates accordingly the price which he gives. It would be most inconvenient and unjust, if men could not, by using the strongest terms which language affords, obviate disputes concerning the quality of the goods which they sell. In a contract such as this, I think there is no fraud unless the seller, by positive means, renders it impossible for the purchaser to detect latent faults; and I make no doubt that this will be held as law when the question shall come to be deliberately discussed in any Court of Justice." This decision is so manifestly in accordance with common sense that it would be unnecessary to make any remarks

upon it; but it should be pointed out that an attempt to conceal patent faults will not cure a sale "with all faults." Supposing, for instance, a seller stopped up sand-cracks with any matter so as to hide the defect, then a sale "with all faults" would not protect the seller. Where a groom painted over the broken knees of a dark brown horse, sold at auction "with all faults," so well that the buyer did not discover the fact that the hair was off the knees until the purchased horse was brought to the new stable and washed, an action was brought to recover back the price paid for the horse, and the questions left to the jury were, was the injury to the knees wilfully concealed? and with an intention to deceive? and the jury found in the affirmative on both questions. On this, judgment was entered for the plaintiff, it being ruled that a sale "with all faults" meant "as the animal was," or without anything being done to hide defects, ailments, or blemishes. If a person wishes to get rid of a horse he knows to be defective, the best way is to sell him by auction, with no conditions whatever—simply selling a horse.

Sale of horse "with all faults" precludes deception.

In concluding this chapter, no better advice can be given to anyone dissatisfied with any bargain in horse dealing than that contained in Selwyn's Nisi Prius (z): "As soon as the unsoundness in a horse is discovered, or any other alleged breach of

(z) 11th ed., article Deceit, p. 650.

warranty, the buyer should immediately tender the horse to the seller (*a*), and if he refuse to take it back, sell the horse as soon as possible for the best price that can be procured (*b*); for the buyer is entitled to recover for the keep of the horse for such time only as would be required to resell the horse to the best advantage" (*c*).

Damages recoverable on breach of warranty.

The amount of damage a person wronged in a horse deal can recover is the difference between the amount paid by him and the amount for which the horse is sold by him, plus such expenses as the buyer has been necessarily put to by reason of the wrongful dealing. If anyone purchases a horse, warranted for a particular purpose, and finds the animal unfit for that purpose, he may, without further notice to the seller, bring an action to recover back the price (*d*), but the better course is to sell the horse after notice, and to sue for the difference.

Trial of horse means reasonable trial.

It has been held, that where a horse was sold with express warranty, and an agreement to take him back if found faulty, it was the duty of the purchaser to return the horse immediately the faults were discovered, and not to delay, unless the seller by subsequent misrepresentation induced

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(*a*) *Caswell* v. *Coare*, 1 Taunt. 567.

(*b*) *Dingle* v. *Hare*, 7 C. B., N. S. 145.

(*c*) Denman, C. J., in *Chesterman* v. *Lamb*, 2 A. & E. 132, citing *McKenzie* v. *Hancock*, Ry. & M. 436.

(*d*) *Chanter* v. *Hopkins*, 4 M. & W. 400.

the purchaser to prolong the trial (*e*). If A. the buyer of a horse with a warranty, resells the animal with the same warranty, he can, if sued by his subvendee B., recover the costs of defending the action of B., from his vendor C., as special damages, provided A. has informed C. of the first action, and offered C. the option of defending it (*f*).

It is sometimes difficult to determine whether an action on the failure of a horse deal should be an action on the contract, or in tort. The powers of amendment, in plaints, are now so large that the point is not of so much consequence as formerly; still, in a large matter, it is as well to be careful. The point is very ably treated in the notes to *Chandelor* v. *Lopus* (*g*). If a warranty is intended and there is a breach, there is good cause of action, whether the defendant knew of the fault or not, but if only a representation was meant at the time of sale, the plaintiff must show that the defendant knew the representation made at time of sale was a false one.

(*e*) *Adam* v. *Richards*, 2 H. Bl. 573.

(*f*) *Lewis* v. *Peake*, 7 Taunton, 153; see also *Wrightup* v. *Chamberlain*, 7 Scott, 598.

(*g*) 1 Smith's L. C. 175, 8th ed.

CHAPTER V.

OF PURCHASE AND SALE WHERE THERE ARE PATENT DEFECTS.

In buying and selling horses, or indeed any other articles, no cause is so prolific of disagreements and subsequent litigation, as bargains or contracts in which the seller has shown, or the buyer should have seen, *patent defects* in the article sold and bought. Patent defects are avowed blemishes or wants in the subject of contract, which are visible or manifest to the naked eye. Where this has been the case with regard to any article bought and sold, it has always been law that "a general warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer" (*a*). Hence it was long ago laid down in *Baily* v. *Merrell* (*b*), "To warrant a thing that may be perceived by sight is not good." Yet, although this doctrine appears so much in accordance with common sense and the ordinary usage of every-day life, so much stress has, in

(*a*) Benjamin on Sales, 2nd ed. 502.
(*b*) 3 Bulstrode, 95.

a commercial country like Great Britain, been laid on the need of upholding the principle of guarantee or warranty, that legal cases have so far established a different doctrine as to make it unsafe, especially in selling horses, to give a warranty, even after both parties have discussed defects or blemishes in the horse the subject of the bargain.

Not prudent to give any warranty if defect patent.

The cases at law are not free from apparent contradiction on this point. In an old case, *Dorrington* v. *Edwards* (*c*), an action was brought on the warranty of a horse as sound, but which was in fact at the time of sale lame from shouldertie. It was contended the action would not lie, because the defect was patent. The judges, however, ruled that as the defendant insisted upon warranting the horse sound, the defendant was bound. "The defendant said I will warrant him sound, that is the distinction where the defect is visible." *Liddard* v. *Kain* (*d*) is quoted, as if it supported the doctrine that a general warranty guarantees the buyer even against every sort of defect, manifestly visible at the time of sale, but this is not so. There Liddard, the seller, when selling two horses to Kain, the buyer, told him that one of them had a cold; but, nevertheless, he warranted the horses as "sound and free from blemish at the end of a fortnight." When that

Liddard v. *Kain*.

(*c*) 2 Rolle, 188. (*d*) 2 Bingham, 183.

time elapsed the buyer refused to take them, one horse still having a cold, and the other having a swollen leg. In evidence, however, it came out that the leg was swollen at the date of sale, and was apparent to every observer. Upon the seller bringing his action for the price of the two horses, the jury found for the buyer, and the Court refused a motion for a new trial, on the grounds that although a warranty was inoperative against patent defects generally, in this case the warranty applied not to the time of sale when the defects were patent, but to some future period—viz., the end of the fortnight. The whole facts of the case are not stated in the reports, but it may fairly be inferred that what happened was this; the seller said: "I have these horses with this cough and blemish, I cannot warrant them now, but will warrant them at the end of a fortnight," for they were blemishes and ailments which a fortnight's nursing would ordinarily remove; but in a fortnight's time these defects were on the horses still, they had not been cured, and the buyer had a right to refuse them; for although he saw the defects at the time of sale, the warranty said they were to be delivered "sound and free from blemish in a fortnight."

Another case on the same points is not so easy of explanation. In *Margetson* v. *Wright* (*e*),

(*e*) 7 Bingham, 603; 8 Bingham, 454.

an action was brought by the buyer of a horse against the seller on an alleged breach of warranty. The facts were these: Margetson, a solicitor, wanted a horse to race, and applied to Wright, a horse dealer, for one; Wright showed him a horse called "Samson," telling the buyer at the same time that the horse was a crib-biter, and also that it had had a splint, which had been reduced, but which had thrown the horse out of training. After some bargaining Wright, the seller, took 90*l.* and a contingent sum of 50*l.* for the animal, which was admitted to have been worth 500*l.* if these defects which were disclosed had not existed; but on the buyer submitting a written warranty to him for his signature, in these words:—"And the said Mr. Wright does hereby warrant the said horse to be sound, wind and limb,"—the latter refused to sign it unless the words "at this time" were added after the statement that the horse was sound. With this addition a warranty was, however, given, and the horse was taken away. Margetson put the horse in training, and at the end of six months "Samson" broke down, whereupon he brought his action for a breach of warranty, and the jury gave him a verdict. A motion for a new trial was made by the defendant, and was granted, and in doing so Chief Justice Tindal laid down some valuable law in relation to dealing in horses where they have patent defects, which, although

Margetson v. Wright.

not exactly bearing on the point now under discussion, is of great value in a general consideration of the subject. He said: "The older books lay it down that defects apparent at the time of a bargain are not included in a warranty, however general, because they can form no subject of deceit or fraud, and originally the mode of proceeding on a breach of warranty was by an action of deceit, grounded on a supposed fraud. There can, however, be no deceit where a defect is so manifest that both parties discuss it at the time. A party, therefore, who should buy a horse, knowing it to be blind in both eyes, could not sue on a general warranty of soundness." He then goes on to suggest that it would have been better, when the case was tried, to have left certain questions to the jury, to consider whether the horse was, at the time of the bargain, sound wind and limb, saving those manifest defects contemplated by the parties, and the Court granted a new trial. On the case going down the jury again found for the plaintiff, and, in reply to the learned judge who tried the case (Baron Vaughan), who asked them to say whether the horse was sound, or, if unsound, whether the unsoundness arose from the splints of which evidence had been given, said "that although the horse had exhibited no symptoms of lameness when the contract was made he had upon him the seeds of unsoundness at the time of

the contract, arising from the splint." Upon another motion for another new trial, the Court refused to grant it, holding that though the buyer knew of the splint the jury found the result, as it turned out, was not apparent to him, and that, therefore, he was protected by the warranty of soundness. It is not probable that this end of the case is satisfactory to any one reading it, and who knows anything about horses; still it is now to be understood as law, and has been followed in other cases (*f*). And the lessons to be learnt from the case are, that if the owner of a horse, having any patent defect, say a clouded eye or a splint, or spavin, wants to sell it, he should be careful not to warrant the animal, without a memorandum on the warranty, if a written one, of such defect, and a statement that he will not be responsible for unsoundness, which may arise from such defect, or proof of such defect being excepted from the warranty, if the warranty be by word of mouth. Speaking as those who must submit to decisions legally made, one must be guided by the case; but otherwise it would be hard to say what Wright, the defendant, could have done more than he did to protect himself. He tells the buyer of the defect; he sells the horse for less than a fifth of the animal's value,

(*f*) *Butterfield* v. *Burroughes*, 1 Salk. 211; *Southerne* v. *Howe*, 2 Rolle, 5.

supposing it had not such a defect; and he insists upon adding to the warranty that the horse was sound these words, "at this time." To persons conversant with horse cases, it is not too much to say his meaning was, "the animal is sound now, but if you train it, I will not be answerable. However, a jury found twice against such a construction of the meaning of the warranty, and the second time the Court refused to disturb the verdict. It is just possible that the defendant knew how and when a horse would train, and the plaintiff, a solicitor, how and when to bring his action; but it seems absurd to say that because a horse in training—and, therefore, almost necessarily a young horse—goes lame, he had the seeds of unsoundness in him six months before. Such a statement may or may not be true, but it could not be proved. But this is true, that every young horse has more or less structural alteration every six months of its life until it attain its fifth or sixth year, and in no place is this structural alteration more marked than in the splint bones. That careful observer, Mr. Percival, in his lectures on the horse (p. 69), says, after speaking of the elastic power of the splint bones: "Be the operation and use of these elastic powers what it may, few horses retain them after the adult period; the ligamentous elastic material becomes converted into osseous inelastic substance, and thus the three bones"—that is, the cannon and two splint bones—"are,

Percival on Splints.

in point of fact, consolidated into one. I have ridden numbers of horses in my time, and, as a general rule, certainly find that young horses possess more elasticity in their movements than old horses; and this is readily enough accounted for when we come to consider the number of animal springs there are in the body, all or most of which become impaired, and some altogether lost in the course of age and work; among them, however, I should say those of the splint bones were probably the smallest in importance, and, therefore, would be the least of all missed. In every horse that has splints this conversion of elastic into osseous union has necessarily taken place; and, as I have said before, this is also found to be the case in every horse of a certain age, whether he show splints or not."

As a rule all horse cases are (as was this case of *Margetson* v. *Wright*) mixed cases of law and of fact, and are most difficult ones for a jury to determine. Judges do their best to explain the points of law, and leave the facts of the case to the jury, and then, if not quite satisfied with the verdict, are unwilling to disturb it; but still many verdicts in horse cases are not satisfactory. A jury is an excellent tribunal to say aye, or no, on certain facts, but when questions have to be left to them, as was done by Baron Vaughan in *Margetson* v. *Wright*, the answers of twelve men are not like the decision of a judge. It is hoped that now,

under the provisions of the new Judicature Acts, horse cases will be tried by a judge alone. They assuredly would be, only that the party in fault will probably elect to have a jury. If sellers and warrantors of horses will, however, carefully read this case, to which some space has been devoted, and learn that a jury found a horse became lame from a splint after it was put in training, and because it had the seeds of unsoundness some months before, and when they consider that in these months it must have naturally acquired considerable structural alterations in its legs, they will possibly think with the writer, that this verdict was straining the law of a breach of warranty most unfortunately for horse sellers, and should be a warning to them to keep clear of juries for evermore.

A somewhat similar state of facts were shown in *Smith* v. *O'Bryan* (*g*). There it was proved that the defendant sold a horse to the plaintiff, but before doing so and giving a general warranty, pointed out to the plaintiff a splint, which was visible on the horse's fore-leg. After a time the horse became lame, and, upon the plaintiff bringing his action, the jury returned a verdict in his favour; and they also found that the lameness arose from the splint to which defendant had, before the sale, called the plaintiff's attention. On

(*g*) 11 Law Times, N. S. 346.

a rule being moved for a new trial, Chief Baron Pollock drew a distinction between a patent defect such as a splint and such a patent defect as blindness, following in effect, and quoting the unfortunate case of *Margetson* v. *Wright*, before referred to. But Baron Bramwell, in following the Chief Baron, gave his decision on other and much wider grounds, namely, that where, as in this case, a written warranty is given, it cannot be modified by any parol evidence that defects existed at the time in contravention of such warranty. He said: "I think the warranty, being a written document, cannot be altered by parol. When the warranty is by parol, I can understand it can be limited by circumstances occurring at the time it was made, although in form it may be general. This does not apply to a written warranty."

Written warranty cannot be altered by parol.

It will be remarked that these words of the learned baron are not precisely bearing on the point before the Court; they are, in fact, *obiter dicta* on another point, namely, the question of admitting parol evidence to vary or enlarge a written warranty, and, therefore, as such cannot be quoted as precedent law. Still, it is not improbable, for reasons given below, that this limited view of a written warranty may hereafter prevail, and, therefore, every horse dealer or seller should be very cautious when selling a horse with patent or known defects in giving any warranty at all, unless the buyer will accept one with a memo-

randum of those defects made on it, as before suggested. Ordinarily a written warranty has been treated by the Courts of law as merely putting into writing the fact that there was a warranty, and although the giver of such a warranty has been bound by it, and has not been allowed to set up the defence of no warranty, it has been permitted to explain the circumstances under which it was given, just as any letter or writing may be explained. It may be that henceforward more restriction will be put upon a written warranty, and, as the learned judge above quoted said, "The warranty being a written document will not admit of alteration by parol."

Warranty is of mutual advantage to buyer and seller.

Probably, after all, there will be no great hardship in this. A warranty is a matter of mutual advantage. The seller gives it to enhance the price of the article he is selling, and the buyer asks for it to protect himself in his purchase. It is right and seemly that a document of such a character should be made and written with some care, and should contain within its wording all the stipulations, conditions and agreements necessary for its construction and validity; but, whatever may be the ultimate decision respecting written warranties, every seller of a horse should remember that where patent defects or known faults exist in the animal he is selling, or where future possible ailments have been discussed, if the seller gives a warranty, it is very probable he

will not be permitted, if sued in an action for breach of warranty in respect of such defects or ailments, to set up the defence that the plaintiff knew of the matters he is complaining of when he bought the horse, and that, therefore, when the seller sold the horse, there could have been no deceit or fraud attempted to mislead the buyer, or induce him to buy the animal. Again, it must be remembered that the rule of law *caveat emptor* will not hold good, where the buyer has not had the opportunity of inspecting the goods. This was laid down long ago in the case of horses. We find in the Year-book 13 Hen. 4, p. 1, a judge saying: "If I buy a horse of you in a different place from where the horse is, through the confidence I have in you, and you warrant him sound in all his parts when he is blind, I shall have a good action of deceit against you." The principle was laid down in *Gardiner* v. *Gray* (*h*). There Lord Ellenborough, after laying down "that in a sale of goods by description, where the buyer has not inspected the goods, there is in addition to the condition precedent that the goods shall answer the description an implied warranty, that they shall be saleable or merchantable. "Where there is no opportunity to inspect the commodity, the maxim *caveat emptor* does not apply." The whole law on the subject was reviewed in the case of

Purchase without inspection may imply warranty.

(*h*) 4 Camp. 144.

Jones v. *Just*, and so far as horse dealing is concerned, the rule of law may be described thus:—if a buyer purchase by writing a carriage horse or a riding horse which he has not seen, and has had no opportunity of seeing, the seller cannot pass off an animal that is not fit for the purpose indicated by the order of purchase. The seller is bound to supply an animal reasonably suited for the buyer's use. At the same time the seller is not bound to deliver the animal fit to the buyer; he is only bound to sell a horse answering the conditions specified as wanted by the purchaser, and if the horse leaves the seller's possession in the state the implied warranty guarantees, the seller is not liable for injuries or deterioration in transit (*i*).

Distinction between defects caused by accident and natural.

A distinction should be drawn between patent defects caused by disease, accident or overwork and those which are natural or only malformations with which the horse was born. A warranty will be of no use against malformations, however detrimental they may be to a horse's action or health. For instance, a horse may have such badly-made shoulders as to cause the animal to move very short and trip constantly, or a horse may be cow-hocked to a degree which will interfere with the action of his hind legs. These are certainly patent defects, but not of the character now

(*i*) 3 L. R., Q. B. 197; and *Bull* v. *Robinson*, 8 Jurist, N. S. 870; 10 Ex. 342.

being treated of. It is a question whether curby hocks are a natural malformation or otherwise. Some veterinary surgeons think they are caused by over-working young horses, and so bringing on more or less enlargement of the stifle joints, and then the horse, being put to hard work, throws out a curb; others insist upon it that horses are born with these hocks, and, therefore, that sooner or later curbs will come on such hocks. In *Brown* v. *Elkington* (*j*) it appeared that a horse threw out a curb a few days after being bought with a general warranty, the horse's hocks being curby, having been objected to by the buyer at the sale. Upon the buyer bringing his action as for a breach, the jury, by direction of the judge, found for the defendant, on the grounds that curby hocks were not symptoms of disease, as splints are, but malformations for which the seller is not liable.

The difficulties attending the sale of horses with avowed faults are so many that it would be better not to give a warranty at all where they exist.

In connection with this matter of patent defects and the general rule of law above mentioned, namely, that a general warranty does not include patent effects, or, in other words, that if a person buys a horse with, say manifestly broken knees, and also takes a warranty, that such warranty shall not refer to the broken knees, much dis-

(*j*) 8 M. & W. 132.

cussion may arise as to how such a rule would apply to a horse dealer. An ordinary buyer would not notice many classes of defects in a horse, or see blemishes or wants in the animal which are symptomatic of disease, but which would or should be at once seen by a horse dealer, and should put him on his diligence. For instance, suppose a horse dealer were bargaining for a horse with very contracted feet, in nine cases out of ten such feet are the results of some sort of foot disease, and a person accustomed to horses would instinctively look out for something wrong there; in such case, would a warranty to a horse dealer exclude such defect, which should be at least patent to him? That is to say, if he took a warranty, and afterwards the horse turned out faulty on his feet, could he set up the warranty, or ought he to be bound by the doctrine of patent defects? As will be shown at a future page, a committee of the House of Lords, presided over by Lord Rosebery, took a great deal of evidence on the subject of warranty, and recommended its discontinuance in horse dealing transactions; and this recommendation was chiefly owing to the statements that some horse dealers insisted upon a warranty from breeders, then kept the horse a few days, and, if they did not get a market, returned it on the breeder's hands. Sometimes this is so, and the reason is that the dealer from his knowledge and skill, detects defects in a horse

which he is pretty certain a veterinary surgeon will pronounce unsoundness, and which he says nothing about at the time of sale. In this particular, it is probable, that the present method of trying horse cases is unsatisfactory, and that it should be a question of fact in an action for breach of warranty when brought by a dealer. Did he know, or ought he to have known, that there were diseases and defects on the horse he was buying,—premonitory, at all events, of unsoundness? If he did, he should be bound by them, and this would often prevent those frauds above alluded to and complained of, where horse dealers get possession of horses with warranties, and then, unless they get a purchaser, threaten to return them to the breeder, and so obtain either an abatement in the price, or some other equivalent.

Advantages of horse dealers under present law.

What patent defect can be more apparent to a horse dealer than incipient broken wind? Yet nine out of ten ordinary buyers, such as farmers, would not know if a horse was, or was not affected with such an ailment in its early stages. Where a horse dealer takes a warranty, why should he recover on an action if the breach is alleged to be some defect or ailment which, in the ordinary course of his business, he must have known and observed? The cases in the law books, however, are in his favour. A distinction would seem to be drawn between defects which are manifest to

every one, and defects which it requires skill to discern. In the former case a warranty or description will be of no use against such defects, and will not be held to include them; whereas, in the latter case—that is, where skill is required to discern and pick out the defects—a warranty would include such defects, and would secure the purchaser against any loss arising from them.

If article warranted buyer not bound to use his skill.

The most marked of these cases is *Tye* v. *Fynmore* (*k*). There, on a sale of "fair merchantable sassafras wood," the purchaser refused to take the article, alleging that these words meant in the trade the roots of the sassafras tree, but that the article tendered to him by the plaintiff was wood—part of the timber of the sassafras tree—not worth more than one-sixth as much as the roots. In answer to this it was proved that a specimen of the *wood* rejected by the buyer was exhibited to him before the sale, and it was also shown that he was a druggist well skilled in the article, and therefore bound to know what he was buying, but Lord Ellenborough said:—"The question is whether it was in the understanding of the trade 'fair merchantable sassafras wood,' which it is clearly proved not to have been. It is immaterial that the defendant is a druggist, and skilled in the nature of medicinal woods. *He was not bound to exercise his skill, having an express undertaking from the vendor as to the quality of the commodity.*"

(*k*) 3 Camp. 462.

The passage printed in italics, is not so emphasized in the original, but is so very strong that the reader's attention is specially directed to it. Assuming such ruling to be law, the same principle would apply to horse dealing, as to buying sassafras wood; and if a horse dealer takes a warranty—that is, an express undertaking from the seller as to the quality of the horse he is buying—he is not bound to exercise his skill to detect any fault or defect in the animal, however manifest or visible it may be to him from the very nature of his trade and the constant exercise of his calling. He will be on the same footing as any other purchaser, however ignorant of horseflesh.

It is partly this state of the law, and partly the unsatisfactory manner in which juries have decided horse cases, which have occasioned the complaints against warranty, and which are to be found given expression to in the Appendix to the Report of the Committee before alluded to.

House of Lords Committee on Horses, 1873.

In 1873, a Committee of the House of Lords, with Lord Rosebery as chairman, took a great deal of evidence respecting the scarcity and breeding of horses, and other matters in connection with the subject. His Royal Highness the Prince of Wales attended the committee, and altogether the members of it were better qualified to inquire into the subject than any other number of gentlemen. The evidence given was very valuable, and in their report the committee say:—"As regards war-

ranty, which it is urged has caused serious loss and annoyance to breeders, it would appear desirable that a specified time should be fixed, beyond which a general warranty should not be enforced. And it is to be hoped, however, after the evidence appended on this point, and considering the commanding position in which breeders are put by the great demand for horses, the system of warranty will disappear in the breeding districts."

After the evidence they had heard the committee could not well do otherwise than make this report, but it is doubtful if all the witnesses knew what they were talking about when they discussed the subject of warranty. Some of them seemed to think that a horse could not be sold without a warranty, and, as a sample of what sensible men sometimes suppose, the following is taken from the evidence of Mr. W. Shaw, a Yorkshire horse dealer (*l*). The Duke of Richmond is questioning him:—

Evidence before Lords Committee, 1873. Mr. W. Shaw.

Q. "You say that horses are warranted, the consequence of which is that a man who sells a horse is bound to take him back from the man who buys if the horse is unsound?

A. "Yes; within six months.

Q. "What makes you say within six months?

A. "That is according to the rules, I suppose.

(*l*) Blue Book, p. 99.

I have heard six months spoken of as the time specified in which it has to be done.

Q. "You do not know it otherwise than by its being spoken of so?

A. "I have known horses kept for about six months, and then returned.

Q. "I suppose a person might sell a horse, and agree to take him back again within three months only?

A. "Yes, he might fix three months by agreement. If it was agreed that the veterinary surgeon should pass the horse before it was sold, then there would be no dispute about it. I think that would be the best plan I could prescribe.

Q. "I am not speaking of what you would think the best plan. Supposing a man sells a horse and warrants him—he may only warrant him for three months—there is nothing to compel him to warrant the horse for six months, is there?

A. "I think that six months is the time, according to the Act of Parliament.

Q. "You think that according to law the time must be six months?

A. "Yes."

Where this gentleman got his law from it is difficult to say. There is no such Act of Parliament; perhaps he had heard of six months in the case of *Margetson* v. *Wright*, before referred to.

Colonel Kingscote, in his evidence (*m*), says a common warranty from Horncastle fair lasts twenty-eight days, and with other witnesses, spoke strongly against the system of warranty; but it is not the warranty, it is more often the system of trying the warranty which is in fault. The breeder gives the warranty to get a good price, and very often the horse is sound; but juries are utterly unfit to try that question. To try the fact, was there a warranty given or not, cannot be done so well by any tribunal as by a jury. And so with every simple question of fact; but, frequently, a horse case is a question of soundness or unsoundness, and is very technical, full of scientific evidence, and is no more fit to go to a jury than a patent case. Still, until cases of this kind can be tried by a judge or by assessors who know something about the business, farmers should hesitate in giving warranties, unless for very limited periods, such as eight days. There is no necessity to do so. Captain Slack, in his evidence before the same Committee (*n*), says that when dealers buy horses at a fair in Ireland, they are never warranted sound by the breeders, and the following extract from the evidence of Mr. P. Sheils, a large general dealer in horses, is material on the subject. The questioner is Lord Kesteven,

(*m*) Blue Book, p. 183. (*n*) Blue Book, p. 194.

who, after remarking he had seen the witness in some parts of Lincolnshire, said (p. 114):

Evidence before Lords' Committee, 1873. Mr. P. Sheils.

Q. "Generally, when you come to a fair, you are sold out before the end of the day?

A. "Yes.

Q. "You never take any back?

A. "Not if I can help it. I am pretty well known, and the people like me, and so I am able to sell, although I do not warrant any. I do not have to give the money back. When I get the money, I stick to it. I have the horses, there they are; if the buyers are not able to judge for themselves, they may get the assistance of any professional man to help them to judge; but I give no warranty, nor do I get one.

Q. "I think I have seen you cleared out of your stock at a very early hour in the day at a fair?

A. "Yes; I have generally a good many customers, that is because I supply them as well as I can.

Q. "It arises from your excellent reputation?

A. "I suppose so. If they did not think I was treating them fairly, they would not stick to me for so many years."

Nor are warranties given in Scotland. Mr. Stephens, in his Book of the Farm (*o*), says: "With

(*o*) 3rd ed. vol. 1, 1399.

Law in Scotland as to warranty.

regard to warrandice, by cases it is seen that it is not necessary by the law of Scotland that a horse should be warranted sound at the period of sale, as is generally thought, to entitle the buyer to return it should it prove unfit for the purpose for which it is sold. . . . . By the law of both Scotland and England, the buyer of a subject, sold with all faults, has no right to question the sale when he has not been drawn into it by fraud."

Meaning of term *sound* when applied to a horse.

We now come to consider what is meant by the term *sound*, as applied to a horse. A sound horse then really is a horse in perfect health, with perfect action or motion in all its limbs and organs. It may be said there is not such a horse; not exactly so, perhaps, but sufficiently to answer the purposes for which horses are required. A veterinary surgeon has remarked that there is no such thing as a sound horse. If by this is meant a perfect horse, it is very near the truth. If a person who knows anything of the action of horses will watch the carriages in Hyde Park in the season—where, perhaps, the finest horses in the world are congregated—he will be surprised to find how many step short, or are in some way faulty in that exact and perfect motion which may be called sound action. The term "perfect action" is used because that is, so far as soundness in moving is concerned, the legal definition of that word; but a horse may have sound action, and yet not be

perfect. In *Best* v. *Osborne* (*m*), it was not disputed that the horse complained of moved soundly enough, but it had been "nerved," that is, an operation had been performed on the nerves of the foot to cure it of lameness. Mr. Justice Best said, after referring to the horse being warranted sound, "sound means perfect, and a horse deprived of a useful nerve was imperfect, and had not that capacity of service which is stipulated for in a warranty of soundness." And so, in *Kiddell* v. *Burnard* (*n*), Baron Parke says: "The word sound means what it expresses, namely, that the animal is sound and free from disease at the time it is warranted to be sound;" and, in the same case, Baron Alderson said, "the word sound means sound; and the only qualification of which it is susceptible arises from the purpose for which the warranty is given. If, for instance, a horse is purchased to be used in a given way, the word 'sound' means that the animal is useful for that purpose, and 'unsound' means that he at the time of sale is affected with something which will have the effect of impeding that use." It may be now taken as law that the term "sound" is as defined by the learned judges in the above case; but whilst this is so, it will be found so much easier to define the negative of soundness—namely, unsoundness—that a chapter is devoted to an attempt to

"Sound" means "perfect."

(*m*) R. & M. 290.

(*n*) 9 M. & W. 670.

show generally what diseases, ailments, and defects have been held to be and are "unsoundness" in a horse, and also to point out those faults or habits in the horse as distinguished from defects constituting unsoundness, and which generally are called vices, and against which a warranty of "free from vice" should protect a buyer.

Vice not easily concealed.

Vice, or really vicious habits, in a horse are so easily enumerated, and so apparent, that it requires no skill to discern them. A biter or kicker soon shows the vice, if it is a real one; and, if it is only a supposed vice, it is often the fault of the buyer; because a person may have bought a horse, and, upon trial, suppose his purchase is vicious and ill-tempered, whereas the animal is really not so. Many horses will be perfectly quiet and good-tempered with persons who are not afraid of them, or who treat them kindly, but who become perfect nuisances where allowed to have their own way, or become so terrified by ill-treatment as to show their fear in the only way dumb animals can show it, by shying, bolting, or kicking. There are, moreover, vices which are only shown on particular occasions, and which are often the product of fear from some particular cause, or resentment for some particular injury.

A horse that was known to be perfectly quiet for years was struck by a groom on the stifle joint with a stable-fork to make it get over while the litter was being shook out; the horse never

forgot it, but whenever afterwards a man passed behind it with a fork in his hand, the animal always kicked or lashed out with one leg at the passer, and the habit became so confirmed that the horse was obliged to be put in a corner stall, or some accident would have happened. It was the horse's only fault, but it was a bad one, and grew into a decided vice. If then a buyer of a horse finds the animal as he thinks vicious, he should, before claiming to set aside the sale on a breach of warranty, consider well whether the horse bought has been properly treated, and by persons accustomed to handle horses. Juries are very unwilling to believe that vice in a horse can be concealed, judging, as is the fact, that if a horse is really vicious it will show the vice at the time of sale, and disregarding complaints of a trifling nature, which often really are playfulness, or the result of too high feeding without work.

Meaning of "quiet to ride and drive," and "quiet in all respects."

In the form of warranty given in a former chapter there is a guarantee that the horse is "quiet to ride and drive;" such a statement means that a horse will go quietly when ridden, and in double or single harness; so too if a horse is warranted "quiet in all respects," this means quiet in harness (*o*). Perhaps no warranty is alleged to be broken so often as one of this class, and yet none in which the buyer of a horse more often fails in

(*o*) *Smith* v. *Parsons*, 8 C. & P. 199.

obtaining redress, not because the horse has not kicked or ran away, or done something clearly showing that on the occasion on which the breach of warranty is alleged he did not behave properly, but because the buyer has not used those proper precautions which every person should use when first trying a new horse. In one case which came to the writer's knowledge, the horse, a young one, was bought in August and not used for two months; it then was put in a dog-cart, and kicked, and upon action brought for breach of warranty the jury said, and rightly, that if a man lets a horse, especially a young one, run for two months, he should use great caution in putting it into harness, and that plaintiff did not use such caution. So it may happen that a saddle does not fit a horse, or a bridle be too short in the cheek-piece, or the harness may be too small and pinch, and in such cases a horse becomes restive for awhile, which would not have happened with its old saddle or in the hands of those to whom it was accustomed (*p*). Another example may be given, in which a horse was sold "quiet to ride and drive by a lady," and as a fact the animal was as quiet as possibly a horse could be. It was of a sluggish nature and slow. Soon after the horse was bought, some young gentlemen, sons of the buyer, put it into a dog-cart to drive a short

High spirit in horse sometime mistaken for vice.

(*p*) *Buckingham* v. *Reeve*, N. P. Exch. 1, 18.

distance on a fishing excursion. Having forgotten their whip, and the animal not going up hill quite as fast as they liked, one of the party struck the horse on the buttocks with the fishing-rod; the horse kicked, and, in doing so, got its leg over the shaft, and an accident occurred. Both buyer and seller in this case were friends, and the matter was referred to a neighbour to decide the case, and he ruled that a whip and not a fishing-rod is the proper instrument to strike a horse with; that the proper place to whip a horse is the flank or shoulder, and that nothing would be more likely to make a sluggish horse kick than pressing him up hill with blows of the nature above indicated; the buyer accordingly kept the horse, which he drove in a brougham for many years afterwards, and had only one fault to find, which was that the animal was too slow and quiet.

Temporary unsoundness, breach of warranty.

In considering the subject of soundness or unsoundness in horses, it should be taken as settled law that any unsoundness is a breach of warranty, whether such unsoundness can be cured or otherwise. Should a horse recover, even before action brought, it is no defence to an action on a breach of warranty. In *Elton* v. *Brogden* (*q*), Lord Ellenborough long since laid down that "a warranty of soundness is broken if the animal at the time of

(*q*) 4 Camp. 281.

sale had any infirmity which rendered it less fit for present service. It is not necessary to prove that the disorder should be permanent and incurable." So again in *Elton* v. *Jordan* (*r*), "any infirmity which renders a horse less fit for present use and convenience is unsoundness."

French law on unsoundness.

By a French law, passed in 1838, twelve diseases and defects are enumerated as legally constituting unsoundness, and various enactments were framed for the purpose of protecting persons dealing in horses. This law has, however, not worked well, and the present French Government are understood to be preparing a new law on the subject. No law that attempts to define fraud will meet all cases. Fraud is too protean to be met by legal enactments of that kind.

Rule as to unsoundness.

The rule as to unsoundness, as laid down in *Elton* v. *Brogden*, is so very clear that it is given here in full: "If at the time of sale the horse has any disease which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal, *this is unsoundness*; or if the horse has, either from disease or accident, undergone any alteration of structure that either

(*r*) 1 Starkie, N. P. C. 127.

actually does at the time or in its ordinary effects will diminish the natural usefulness of the horse, such a horse is *unsound*." With this definition, it is proposed to present shortly to the readers, in another chapter, those diseases and defects which constitute in law unsoundness.

CHAPTER VI.

THE RIGHTS AND LIABILITIES OF INNKEEPERS, LIVERY STABLEKEEPERS, AND OTHERS IN RELATION TO HORSES.

The object of this work being more particularly to explain the laws and rules relating to horses, it is not proposed to enter minutely into the laws generally regulating inns and mews, but to show where innkeepers and others are required to provide for guests' horses, and the liabilities they incur respecting such horses generally; also, what rights innkeepers and others have over the horses of guests and customers in their stables or fields.

Definition of a common innkeeper.

First let us consider, Who may be said to be an innkeeper? "Every person who makes it his business to entertain travellers and passengers, and provide lodgings and necessaries for them and their horses and attendants, is a common innkeeper; and it is in no way material whether he have any sign before his door or not" (*a*). But a person who merely opens a house for the sale of provisions and refreshments and does not profess

(*a*) Bacon's Abr. Inns, B.; *Parker* v. *Flint*, 12 Mod. 255.

to furnish beds and lodgings for the night, is not a common innkeeper (*b*). Every man who opens an inn and professes to exercise the business of a common innkeeper is, by the custom of the realm, bound to afford such shelter and refreshment as he possesses to all travellers (*c*), and moreover, to receive and provide for the horses of all travellers who alight at his inn, if he has room in his stables (*d*).

The law relating to the general rights and liabilities of that class of tradesmen is now governed to a great extent by a statute passed in 1863, "respecting the liability of innkeepers, and to prevent frauds on them" (26 & 27 Vict. c. 41); but this act, while it saves them from liability to make good "any loss of or injury to a greater amount than 30*l.* to goods or property brought to their inns," excepting in certain cases specially provided, exempts *a horse or other live animal*, or any gear appertaining thereto, or any carriage. The law, therefore, so far as regards horses and carriages left at an inn, is much as it was before the passing of that act, and its general bearing may be gathered from *Calye's case* (Smith's Leading Cases, Vol. I.).

Innkeepers Act, 26 & 27 Vict. c. 41.

(*b*) *Doe* v. *Lamming*, 4 Camp. 77.

(*c*) *Robinson* v. *Walter*, 3 Buls. 270; *Taylor* v. *Humphreys*, 30 L. J., M. C. 242; *Copley* v. *Burton*, L. R., 5 C. P. 489.

(*d*) *Saunders* v. *Plummer*, Orl. Bridg. 227.

Definition of an inn.

An inn is defined in *Thompson* v. *Lacy* (*e*) to be a "house where the traveller is furnished with everything he has occasion for while on his way." A person who keeps an inn has certain responsibilities imposed on him which may be called liabilities, and certain privileges which may be called rights. As was before stated, it is generally admitted that an innkeeper undertakes to receive and entertain all travellers until his house is filled, and an innkeeper by opening a common inn in the country undertakes to receive and keep the horses of those who come to his inn (*f*). Sometimes a difficulty arises in determining who is a traveller; but a bonâ fide traveller has a right to be provided for in an inn if there is room both for himself and his horse (*g*), and a refusal by an innkeeper to give accommodation may subject him to an indictment (*h*). Under the old law an innkeeper, though licensed to let post-horses, could refuse to supply a chaise and horses to enable a guest to resume his journey, even though tendered a reasonable sum (*i*); nor is he bound to provide for his guest the precise room the latter may choose to select: all that he is required to do is to find reasonable

Duties of innkeepers.

(*e*) 3 B. & A. 286.

(*f*) *Jones* v. *Osborne*, 2 Chitty, 484; and *Saunders* v. *Plummer*, Orl. Bridg. 227.

(*g*) *Hawthorn* v. *Hammond*, 1 C. & K. 407; *Fell* v. *Knight*, 8 M. & W. 269.

(*h*) *R.* v. *Ivens*, 7 C. & P. 213.

(*i*) *Dicas* v. *Hides*, 1 Starkie, 247.

and proper accommodation for his guests and their horses, in short, such accommodation as the inn possesses without inconveniencing others (*k*). If the innkeeper has only a stable for a horse he is not bound to receive the carriage (*l*). If a person goes to an inn to stay there, and the innkeeper receive him as a guest, the innkeeper will be liable if the guest's horse is stolen (*m*), even if the guest is only received and has come for mere temporary refreshment (*n*). In *York* v. *Grindstone* (*o*) three judges held, against Lord Holt's opinion, that if a guest leave his horse at an inn and lodge elsewhere, he is a guest, "because," they said, "the horse must be fed, by which the innkeeper hath gain; otherwise, if he left a dead thing." If a guest desire the innkeeper to put his horse out to grass and the horse is lost or stolen, the innkeeper is not liable. He is only liable for the loss of a horse from within the hostelry, and that only by the custom of the realm (*p*); but if the innkeeper puts the horse out to grass without the owner's request, then he is liable (*q*). However, if the horse be stolen from the inn stable by means of a

Liability of innkeeper in respect of guest's horse.

(*k*) *Fell* v. *Knight*, 8 M. & W. 270.

(*l*) *Broadwood* v. *Granara*, 10 Exch. 423; 24 L. J., Ex. 1.

(*m*) *Jelly* v. *Clarke*, Cro. Jac. 188; Bac. Abr. Inns, c. 5.

(*n*) *Bennett* v. *Mellor*, 5 T. R. 273.

(*o*) Salk. 388; 2 Lord Raymond, 868.

(*p*) *Saunders* v. *Plummer*, Orl. Bridg. 226.

(*q*) *Calye's case*, 8 Coke, 32 b; *Moseley* v. *Fosset*, 1 Rol. Abr. 5; *Richmond* v. *Smith*, 8 B. & C. 9; 2 M. & R. 235.

false stable key, and there has been no negligence by the innkeeper, it might be held that he was not liable (*r*).

There is a common idea amongst country innkeepers, that they may detain anyone who has run up a bill at their house, but the law is that an innkeeper cannot detain the person of his guest, or the guest's clothes, in order to secure payment of his bill (*s*); but he may detain the guest's horse or carriage for its keep, or the horse and carriage of another person, if brought by a guest (*t*). Occasional absences from the inn, during a long stay, will not defeat the innkeeper's lien, as, where a trainer of horses went to an inn and stayed there for a long time, in fact remained there while his horses were training, it was held, by the Exchequer Chamber, that the innkeeper's lien was not lost because the trainer frequently took the horses for days together off the premises, to attend races in different parts of the country (*u*).

Innkeeper has a lien on his guest's horse.

If, however, an innkeeper knows that a horse

(*r*) *Mackenzie* v. *Cox*, 9 C. & P. 632.

(*s*) *Sunbolf* v. *Alford*, 3 M. & W. 248; 1 H. & H. 13.

(*t*) *Saunders* v. *Plummer*, Orl. Bridg. 227; *Smith* v. *Dearlove*, 6 C. B. 135; see also *Turrill* v. *Crawley*, 13 Q. B. 197; *Snead* v. *Watkins*, 1 C. B., N. S. 267; 26 L. J., C. P. 57; *Thompson* v. *Lacy*, 3 B. & A. 283.

(*u*) *Allen* v. *Smith*, 12 C. B., N. S. 638; 9 Jur., N. S. 230, 1284; see also *Threfall* v. *Borwick*, L. R., 7 Q. B. 711.

brought to his inn is not the property of the person bringing it, but is brought for a wrong purpose, as, for instance, where one removed a horse from the premises of a debtor to defeat a creditor's claim, and put it in an inn stable, the innkeeper being aware of the facts, the latter has no lien for the keep or meat of the horse (*x*). An innkeeper has no lien upon a horse put into his stable, except for a debt due from his guest (*y*). An innkeeper should remember that if he detains a horse for its meat, he cannot use it, because the detention is the custody of the law, and a distress cannot be used by the distrainer (*z*). By the custom of the city of London an innkeeper may take the horses of a guest who owes him money as his own, upon the reasonable appraisement of four of his neighbours (*a*). But now, since the Innkeepers Act, 1878 (*b*), an innkeeper should, after giving proper notice as in that act is provided, sell and dispose of by public auction any carriages or horses which may have been left in the coach-house or stable of the house he keeps, and repay himself for the keep and expense of any horse left

An innkeeper cannot sell his guest's horse.

Except his inn be in London,

or under Innkeepers Act, 1878.

(*x*) *Johnson* v. *Hill*, 3 Starkie, N. P. C. 172.

(*y*) *Binns* v. *Piggott*, 9 C. & P. 208.

(*z*) *Westbrook* v. *Griffith*, Moor, 876; *Robinson* v. *Walter*, 3 Bulstrode, 270.

(*a*) *Baldway* v. *Ouster*, 1 Vent. 71; *Westbrook* v. *Griffith*, Moor, 876; *Moss* v. *Townsend*, 1 Bulstr. 207.

(*b*) 41 & 42 Vict. c. 38, s. 1.

with or standing at livery in the stable or fields occupied by such innkeeper.

Where goods or chattels of a guest have been actually delivered to an innkeeper, or to his servants, the latter cannot discharge himself from responsibility by showing that the goods were afterwards stolen outside the inn, if he himself put them in the spot from whence they were taken. In *Jones* v. *Tyler* (*c*) the facts were as follows:—The plaintiff, a farmer, drove his horse and gig to an inn on a market day, and the ostler took the horse out of the gig and put it into a stable. He then placed the gig outside of the inn yard, in a part of the open street, where the innkeeper was in the habit of placing the carriages of his guests on market days, and the gig was stolen by some person and could not be found. It was held that the innkeeper was responsible for the loss. Mr. Justice Taunton said, "If the innkeeper wished to protect himself he should have told the plaintiff he had no room in his yard, and that he would put the gig in the street, but could not be answerable for it. Not having done so, he is bound by his common law liability." An innkeeper is liable for an injury done to a horse if taken out of the inn and immoderately ridden and whipped, though it may not appear by whom (*d*).

Liability of innkeeper for his guest's carriage.

(*c*) 1 A. & E. 522; *S. C.*, 3 N. & M. 576.
(*d*) *Stannion* v. *Davies*, 1 Salk. 404.

He is also liable for an injury done to a horse of a guest while in his stable, if due care be not taken of the animal according to express directions (*f*). Where a guest's horse is injured at an inn, there is always a presumption of negligence against the innkeeper. Whether this negligence can be rebutted, by anything short of actual negligence by the guest is doubtful. In *Dawson* v. *Chamney* (*g*) evidence was given of such skilful management on the part of the innkeeper, that the jury were of opinion that the damage could not have been occasioned by his negligence, and we find in Addison on Torts, 4th edition, p. 500, that "The innkeeper is not responsible for injuries which the horses of guests inflict upon each other in the stables of the inn, provided he has taken all due care to prevent the introduction into the stables of vicious and kicking animals." Perhaps this view of the law is too narrow, and the reader should consult *Morgan* v. *Ravey* (*h*), where C. B. Pollock, in delivering the judgment of the Court of Exchequer, said, "We think the cases show there is default in the innkeeper whenever there is a loss not arising from the plaintiff's negligence, the act of God, or the queen's enemies."

If guest's horse injured at inn, negligence by innkeeper presumed.

(*f*) *Legge* v. *Tucker*, 1 H. & N., Exch. 500.

(*g*) 13 L. J., Q. B. 33; 5 Q. B. 165; 7 Jurist, 1037; D. & M. 318; *Cashill* v. *Wright*, 6 Ell. & B. 896.

(*h*) 30 L. J., Exch. 131; 6 H. & N. 265.

Horses of guest cannot be distrained by innkeeper's landlord.

The horses of a guest standing at an inn cannot be distrained (*i*), nor can the horse of a guest at an inn, if put into a strange stable on account of there not being sufficient room in an inn stable (*k*). A livery stable keeper has not the same common law right of lien over a horse standing in his stables for its keep (*l*), nor for money paid to a veterinary surgeon for medicines for a horse while in his stable (*m*); but, of course, he can have a lien if he have a special agreement, as where a mare was placed with a livery stable keeper, who advanced money to her owner, and it was agreed that she should remain in the livery stable keeper's stables as a security for the repayment of the money advanced and for the expense of her keep, it was held that the livery stable keeper had a lien on the animal for the amount due (*n*). So, too, the lien of a livery stable keeper may continue, even after a horse has been fraudulently removed from his stables (*o*), if there has been an agreement. Speaking generally, then, it may be said that an innkeeper has the right to detain, not to

Livery stable keeper has no lien by common law.

(*i*) Rol. Ab. 668; Co. Litt. 47.

(*k*) *Francis* v. *Wyatt*, 3 Burr. 1498; and *Crosier* v. *Tomkinson*, 2 Ld. Ken. 439; see also *Williams* v. *Holmes*, 22 L. J., Ex. 284.

(*l*) *Judson* v. *Etheridge*, 3 Tyr. 954; 1 C. & M. 743; *Yorke* v. *Greenaugh*, 2 Ld. Ray. 868.

(*m*) *Orchard* v. *Rackstraw*, 19 Law J., C. P. 303.

(*n*) *Donatty* v. *Crowder*, 11 Moore, 479.

(*o*) *Wallace* v. *Woodgate*, R. & M. 193; and 1 C. & P. 575.

sell, the horse of a guest at his inn for the keep of the horse or for the guest's bill, but a livery stable keeper has no such right. A horse, moreover, at an innkeeper's cannot be taken in distress for rent due by the innkeeper, but a horse standing at a livery stable keeper's is distrainable for rent (*p*). An innkeeper would appear to have certain larger rights than a livery stable keeper, because the latter is saved from many of the inconveniences incurred by the innkeeper, such as the billeting of soldiers, the obligation to receive a guest, and the like.

Grazing horses or cattle.

It is not an uncommon thing for farmers to take a certain number of horses, cattle and sheep into their fields to graze during the summer months, and horses into their strawyards during the winter months. Persons who do this are called in law "*agisters*." It will be convenient to use this word in treating of the rights and liabilities of such persons. An agister is in some respects better off than an innkeeper. He does not, like an innkeeper, insure the safety of the horse he takes in to graze or to keep in the strawyard, but an agister must use ordinary care. If a horse is taken from his premises, or is lost, by an accident against which he could not guard he is

(*p*) *Francis* v. *Wyatt*, 3 Burr. 1498; *Parsons* v. *Gingell*, L. J., C. P. 227; 4 C. B. 545; *Yorke* v. *Greenaugh*, 2 Ld. Ray. 866.

not responsible, but slight evidence is sufficient to make him liable (*p*).

Thus where the defendant, a farmer, took in the plaintiff's horse to graze, and the horse in some way got out of the field and was lost, and it was shown that the gate was sometimes left open and that the fences were not good, although it could not be proved that the horse came out of the gate or through a broken part of the fence, yet the jury gave a verdict for the plaintiff for the value of the lost horse. Generally, if the fences of a field in which horses are taken in to graze are defective, or there are holes or bogs from marsh in the field and an animal is lost or injured, the agister will be responsible (*q*).

Farmer taking in stock has no lien on them.

An agister has no lien over the animals he takes in to graze in respect of the grass they may have eaten. Thus a farmer who took in milch-cows to depasture, the owner having the right to milk them when he pleased, was held to have no lien over them when the owner failed to pay for the rent (*r*). If there is a special agreement that the

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(*p*) *Broadwater* v. *Blot*, Holt, 547; and see *Corbett* v. *Packington*, 6 B. & C. 268.

(*q*) *Moseley* v. *Fossett*, 1 Rol. Abr. 4; and see *Booth* v. *Wilson*, 1 B. & Ald. 59; and *Powell* v. *Salisbury*, 2 Y. & J. 391; *Groucott* v. *Williams*, 32 L. J., Q. B. 237.

(*r*) *Jackson* v. *Cummins*, 5 M. & W. 342; *Chapman* v. *Allen*, Cro. Car. 273.

horse or any other animal shall not be removed until their keep is paid for, then, of course, there may be a lien (*s*). Horses put into a field to be agisted may be distrained by the landlord (*t*), but not if put in only for one night by a drover or cattle dealer (*u*), although it was once held differently (*x*). Many questions arise between farmers and railway companies, by reason of the trains of the latter running over horses and cattle getting on the line. There is no special law or rule on this subject. The great point for farmers or agisters to prove is, that they have not been guilty of negligence, in leaving their fences broken or unmended. Every man is bound to keep his horses or cattle properly confined; if they get out, it will be for him to prove that their escape was due to accident and unavoidable.

(*s*) *Richards* v. *Symons*, 8 Q. B. 90.
(*t*) *Jones* v. *Powell*, 5 B. & C. 647; 8 D. & R. 416.
(*u*) *Tate* v. *Gleed*, C. B., H. T., 2 Saunders, 290.
(*x*) *Fowkes* v. *Joyce*, 2 Vent. 50.

CHAPTER VII.

THE LAW RELATING TO LETTING AND HIRING HORSES.

In the present day, when so many people prefer what is called, jobbing their carriages and horses, that is, hiring them from a jobmaster, it is of some consequence to know a few of the plain rules of law which affect this class of contracts. To prevent troubles with servants and to avoid the risk which always attends horsekeeping, particularly when horses are kept out late at night, many persons, even noblemen of the first rank, hire their horses by the year or for a shorter period from keepers of horses, who for this purpose are called, and call themselves, jobmasters. These last are, as a class, a most respectable body of tradesmen, and the horses and equipages they send to their customers are equal to any turned out of private stables. They incur certain liabilities and have certain rights. Perhaps the chief liability is one not always clearly recognized, namely, that when a person lets out a horse or carriage for any particular purpose he warrants that the horse or carriage so let out is reasonably

Jobmaster's, their rights and liabilities.

fit for such purpose (*a*), nor will this warranty be weakened by the fact, that the gentleman or other person hiring that carriage and horse, has selected out of the owner's stables a particular horse, as the latter by allowing the horse to go out has implied that the animal is fit for the work for which he is selected. On the other hand, the hirer has no business to use the horse for any other purpose than that for which the animal was hired. If a gentleman hires a horse as a riding horse, he must not put the animal into harness; if he does so and an accident happens the hirer is liable. Also the hirer should remember that, although as a rule, which will be more fully explained, horses hired are at the risk of the owner and letter, and that the latter is liable for almost any accident or loss, still if the hirer keeps the animal longer than the time stipulated for letting, then he is answerable in almost any event.

Jobmaster letting carriage warrants it fit for purpose hired.

As was said, as a rule the owner of a horse letting it out for hire is answerable for every loss and accident sustained. At all events he is answerable unless he can prove positive negligence by the hirer. Thus where one hired a horse which fell down and broke its knees while being driven by the hirer, the owner failed in his action to recover compensation, although he proved the horse was a good horse and not a stumbler, but

(*a*) *Chew* v. *Jones*, 10 L. T. 231, 308.

he could not prove actual negligence by the defendant, and must run the risk of a horse falling owing to loose stones, ice, slippery pavement, or the like (*b*). But a hirer has no right to overwork a horse or to pursue a journey with a horse unfit for work. In *Chew* v. *Jones*, quoted above, it was held that if a horse falls lame on a journey the hirer may leave him at the nearest stable, giving notice to the owner, whose duty it is to send for him. But in *Bray* v. *Mayne* (*c*), where a hirer continued to drive a horse after it was exhausted and refused its food, it was held that the hirer had done wrong, and he was fixed with the price and value of the horse which had been overdriven. A hirer of horses gives an implied undertaking, when he hires the animals, that he will use the same degree of care which a prudent man would use towards his own horses (*d*).

Hirer of horse must not overdrive it.

In the cases mentioned before, the law has been applied to facts where the horse has been driven or ridden by the hirer himself or by his servants, the rule being that if a carriage and horses are let out to hire by the day, week or job, and the owner of the turn-out or of the horses selects and appoints the driver, then the owner is responsible

(*b*) *Cooper* v. *Burton*, 3 Camp. 5.

(*c*) Gow, N. P. C. P. 1; *Handford* v. *Palmer*, 5 Moore, 79.

(*d*) See per Lord Ellenborough in *Dean* v. *Keate*, 3 Camp. 4; and *Handford* v. *Palmer*, 2 Bro. & Bing. 359.

for all injuries resulting from the careless and negligent driving of the conveyance, although under the control and in the possession of the hirer (*e*); but if the hirer choose to drive himself, or if he appoints the coachman or supplies the horses, the owner of the carriage cannot be responsible for the negligence or want of skill of the coachman (*f*).

Speaking generally, where the owner and letter supplies the servant to ride or drive the horses, all the hirer has to do is to see that no injury is done by himself or friends to the inside of the carriage, assuming the whole turn-out to be hired. He is not answerable for damage done by the negligence of the jobmaster or letter's servants. *Quarman* v. *Burnett* (*g*) is a leading case on this point: there two ladies, having a carriage of their own, hired a pair of horses from a jobmaster, who also supplied the driver. The ladies were in the habit of giving the driver a present every day, and provided him with a livery hat and coat to drive out in. These last he was accustomed to leave at the ladies' house. After driving them for three years without any accident, one day, as the driver was taking off the livery coat in the hall of the house, the horses started

Quarman v. *Burnett.*

(*e*) *Laugher* v. *Pointer*, 5 B. & C. 547.

(*f*) *Croft* v. *Alison*, 4 B. & Ald. 590; *Hall* v. *Pickard*, 3 Camp. 187.

(*g*) 6 M. & W. 507.

off and injured the plaintiff Quarman: it was held that the defendants, the two ladies, were not responsible, as the coachman was not their servant, but the servant of the jobmaster. In giving judgment in this case, Baron Parke remarked, that there may be special circumstances in which a hirer of jobhorses and servants may become responsible for the negligent acts of the servant, though not liable by virtue of the general relation of master and servant. As, if the hirer takes upon himself the actual management of the horses, or order the servant to drive in a particular manner. So if directions are given by the hirer of horses to the driver or postilion of a carriage to break through a line of carriages and to take up a particular position, or to do any unusual, improper or aggressive act, or if he interferes so as to take the actual management into his own hands, he is responsible, and not the owner or letter, for any damage done by the driver while carrying out the directions given (*h*). A common error exists amongst jobmasters, that if the hirer sits outside beside the driver, then their liability ceases. There is no other foundation for this notion, than some remarks of the judges in giving judgment in the case last referred to, where the hirer was sitting outside and directing the postilions. It is always a question for the jury, whether the coachman is acting

Maclaughlin v. Pryor.

(*h*) *Maclaughlin* v. *Pryor*, 1 C. & Marsh, 351; 4 M. & G. 48.

as the servant of the owner, or the servant of the hirer, and it is almost impossible to lay down any fixed rule on the subject, other than was mentioned above, namely, where the hirer does nothing and says nothing, the jobmaster's coachman is the servant of the jobmaster, and the owner, the jobmaster, is answerable for any negligence of his servant (*i*). If a person hires a horse and chaise and allows himself to be driven by a friend, he is responsible for the negligence of the driver, as for his own negligence (*k*).

Hirer of a conveyance liable for the negligent driving of a friend.

Whilst jobmasters are, to some extent, put under certain disadvantages by reason of their coachmen or servants, often having to please two persons—one, their actual master, and the other, who may be termed their employer for the time being, it should be remembered that a jobmaster, like any other master, is only liable so long as the servant is properly doing something within the scope of his employment. If a servant wrongfully takes a carriage for his own purpose, and drives against another carriage, the master or owner is not responsible (*l*). When the defendant's coachman was driving the defendant's car-

(*i*) See Lord Abinger's remarks in *Brady* v. *Giles*, 1 M. & Rob. 496.

(*k*) *Wheatley* v. *Patrick*, 2 M. & W. 650; *Williams* v. *Holland*, 10 Bing. 112.

(*l*) *McManus* v. *Crickett*, 1 East, 106; *Sleath* v. *Wilson*, 9 C. & P. 607.

riage through a narrow street, which was blocked up by a luggage van containing the goods of the plaintiff, which the latter was unloading and taking into his house, and the plaintiff's gig stood behind the van, and the defendant's coachman (there being no room for the carriage to pass) got off his box and by leading on the van horse moved the van, and so caused a large packing-case to fall on the shafts of the gig and to break them, it was held that the defendant (the master) was not liable for the injury, the coachman at the time not doing his master's work and not having moved the van in the execution of his master's orders (*m*).

To make master liable, servant must be acting within scope of his employment.

It is not always easy to determine what acts are, and what are not, within the scope of the servant's employment. In *Storey* v. *Ashton* (*n*), the defendant, a wine merchant, sent his carman and clerk with a horse and cart to deliver wine, and bring back empty bottles. They delivered the wine and received the bottles, but when they got within a quarter of a mile from home, instead of driving there straight and depositing the empties, the carman was induced by the clerk to drive in another direction on business of the clerk's. While they were doing this the carman drove over the plaintiff, and the court held that the defendant

(*m*) *Lamb* v. *Palk*, 9 C. & P. 629; but see *Page* v. *Defries*, 7 Best & Smith, 139, in which Blackburn, J., said "at the trial I thought *Lamb* v. *Palk* was not law."

(*n*) L. R., 4 Q. B. 476; 38 L. J., Q. B. 223.

was not liable, as the injury complained of was not done by the carman in the course of his employment. In connection with the case last quoted should be read *Whatman* v. *Pearson* (*o*): the defendant, who was a contractor, employed men with horses and carts to load earth. The men were not allowed to leave their horses and carts at dinner time, but were supposed to remain at hand while the horses baited. One of the men, however, went home to his dinner, some little distance from the work, with his cart, and left it standing at his own door, with no one to attend to the horse. The horse ran away and ran the cart against the plaintiff's fence, thereby injuring it: the court held that it was properly left to the jury to say, whether the carter was acting within the scope of his employment, and that the jury were justified in saying that he was. This case of *Whatman* v. *Pearson* would appear also to overrule *Sleath* v. *Wilson* (*p*), a case much quoted to show a master's liability, and which had been previously modified by *Seymour* v. *Greenwood* (*q*). There an omnibus passenger, slightly intoxicated, refused to get out and pay his fare to the conductor when the omnibus arrived at its destination; the conductor dragged him out and caused him to fall under the wheel of a passing cab; the omnibus proprietor was held

(*o*) L. R., 3 C. P. 422.
(*p*) 9 C. & P. 607.
(*q*) 6 H. & N. 359; affirmed, 7 H. & N. 355.

responsible, the jury finding that the injury was done by the servant (the conductor) in the course of his employment about his master's business, and the court remarking that the master put the conductor in his place. Again, where an omnibus company gave written instructions to their drivers "to drive at a steady pace, and not on any account to race with or obstruct other omnibuses," and a driver disobeyed these instructions and wilfully obstructed another omnibus, by drawing across the road and ran against it and upset it: it was held, in the Exchequer Chamber, that the instructions given by the omnibus company to their servants would not exonerate the former from responsibility for the wilful and malicious act of their servants while carrying passengers for the benefit of the company (*r*). Generally speaking, and it must be remembered the question is a difficult one, for it is a question of implied authority, in all cases of negligent and rash driving by a servant employed to drive, the master will be held responsible if the servant was driving about his master's business or using the carriage and horses for the master's benefit; and the master will not be excused by showing that the servant was acting contrary to his orders.

Limpus v. *London General Omnibus Company.*

Anyone hiring a horse should be careful not to

(*r*) *Limpus* v. *London Gen. Om. Co.*, 1 H. & C. 526, and 32 L. J., Exch. 34.

doctor the animal himself, in case it should fall ill or injure itself. It has been held that if a hired horse is taken ill on the road and the hirer calls in a farrier, then the former is not responsible; but if he chooses to prescribe himself and the horse die, he is liable to the owner for the loss. In *Deane* v. *Keate* (*s*), Lord Ellenborough said, "Had the defendant called in a farrier he would not have been answerable for the medicines the latter might have administered, but when he prescribes himself he assumes a new degree of responsibility, and prescribing so improperly I think he did not exercise that degree of care which might be expected from a prudent man towards his horse, and was in consequence guilty of a breach of the implied undertaking he entered into when he hired the horse from the plaintiff."

Not prudent for hirer of horse to attempt to physic it.

(*s*) 3 Campbell, 4.

CHAPTER VIII.

ON RIDING AND DRIVING HORSES.

It is not the purpose of this work to attempt to teach people how to ride and drive. The inhabitants of the British isles are not wanting in self-appreciation on many points,—that they do excel other people as sailors, and as riders and drivers of horses, is admitted everywhere. It will be sufficient, then, here to give the rule of the road, and to point out cases where the infraction of that rule has heretofore resulted in actions against the wrongdoer, and consequently that any negligent non-observance of that rule will entail punishment or loss. The rule is often expressed in an old doggrel rhyme, which has many versions, thus,—

Rule of road for drivers and riders.

> The rule of the road is a paradox quite,
> Mark as you go along;
> If you keep to the *left* you are *right*,
> If you go to the *right* you are wrong.

But this rule, by modern decisions, is not absolute (*t*). There may be circumstances which oblige a driver of a carriage to leave the regular side of the road. All that can be said is, that if he leaves

(*t*) *Plackwell* v. *Wilson*, 5 C. & P. 375; *Chaplin* v. *Hawes*, 3 C. & P. 554; *Luck* v. *Seward*, 4 C. & P. 106. See remarks by Court in *Boss* v. *Litton*, 6 C. B., N. S. 667.

the left side, he must take care and keep a better look out than if he were on the proper side of the road; in other words, he must not be negligent. It is by no means easy to define what is negligent driving. Many cases of collision take place from the driver not looking at his own horses when passing another vehicle, but looking at the face of the driver of that vehicle. This clearly is negligence. Again, if anyone observes a cabman with an empty cab at a crossing, it will be found, that in nine times out of ten, he will be looking about for a fare, sometimes with his head turned directly round from his horse, especially if the crossing is where four roads meet. This is negligence; but in both cases it would be difficult to prove, and difficult to impress a jury, that such away-looking is wrong, and yet many accidents occur from both these causes.

If pure accident no one is liable.

Generally speaking, if an injury results from circumstances over which a person has no control, that is, if it is a pure accident, the rider or driver of a horse will not be answerable. Thus, where the defendant's horse, becoming frightened by the rattle of a butcher's cart, broke away, and in running away plunged the shaft of the gig in which it was being driven into the breast of the plaintiff's horse, the defendant was held not answerable (*u*). So, too, where a horse, ridden by

(*u*) *Wakeman* v. *Robinson*, 1 Bing. 213; 8 Moore, 63.

defendant, was frightened by a clap of thunder, and ran over the plaintiff, who was standing with others in the carriage road (*x*). In *Hammack* v. *White* (*y*), where a horse, naturally vicious but not known to be so by the defendant, who was riding it, became restive and unmanageable, and, notwithstanding the defendant's efforts, ran upon the foot pavement and killed the plaintiff's husband, Erle, C. J., thought the case should not be left to the jury, unless some positive negligence was shown on the part of the defendant. The plaintiff urged that the defendant should not have ridden a horse he did not know (for it appears he had only bought it the day before) in a very frequented place; but the C. J. added, "I am of opinion a man is not to be charged with want of caution because he buys a horse without having previous experience of him. There must be horses without number ridden every day in London, of whom the riders know nothing. A variety of circumstances will make a horse restive. The mere fact of restiveness is not even *primâ facie* evidence of negligence." It may be assumed, generally, that where horses run away and a person is injured, then the driver is not answerable (*z*); but of course this may be rebutted, as by showing the horse, or one of a pair, had ran away on a previous

Hammack v. White.

(*x*) *Gibbons* v. *Pepper*, 1 Ld. Raymond, 38.

(*y*) 11 C. B., N. S. 588; 31 L. J., C. P. 129.

(*z*) *Rex* v. *Timmins*, 7 C. & P. 500; *Gibbons* v. *Pepper*, supra.

occasion to the defendant's knowledge, or that the driver had been flogging them. So, too, if a horse, not known to be of a vicious disposition by the rider, kicks out and injures a bystander, the rider will not be responsible; but there is negligence, and a want of ordinary care, if a person riding a vicious horse, spurs it when close to a bystander, and the horse kicks out and injures him (*a*).

To make driver or rider liable for injury, negligence must be shown.

Although the remarks of C.J. Erle in *Hammack* v. *White*, above quoted, would show that, in some cases, an action is not sustainable against a person for riding an unruly horse in a public place of resort, there may be circumstances where such conduct would render a driver or rider liable for injuries done (*b*); and the better plan is to try horses in more open spots, where the opportunities of inflicting injury are not likely to occur. The rule in all cases is, that there must be some affirmative proof of negligence on the part of the defendant to support an action. If the balance of evidence is perfectly even, and fails to distinguish which side, the plaintiff or defendant, has failed to take proper care, the plaintiff must fail in his action, as he founds his claim on the imputation of negligence and fails to establish it (*c*).

(*a*) *North* v. *Smith*, 10 C. B., N. S. 572.

(*b*) *Michael* v. *Alestree*, 2 Lev. 178.

(*c*) *Cotton* v. *Wood*, 8 C. B., N. S. 571; 29 L. J., C. P. 333; *Kearney* v. *London and Brighton Rail. Co.*, L. R., 5 Q. B. 111; and 6 L. R., Q. B. 759.

Sometimes an injury is done by the driver or rider of a horse, where the immediate cause of the injury or accident is due to something else, as where the rider or driver of a restive or runaway horse becomes nervous and loses his head and pulls the horse in the wrong direction. Sometimes a nervous driver makes his horses nervous; sometimes the horses, bolting or kicking, frighten the driver and he contributes to injuries to himself or to his carriage or team. In *Flower* v. *Adam* (*d*) the facts were as follows:—Some bricklayers, employed by the defendant, had wrongfully laid a large heap of lime rubbish opposite the defendant's door and on the side of the highway. Whilst the plaintiff was passing in his chaise the wind blew about the rubbish, and the dust frightened the plaintiff's horse, causing it to shie on one side, when the plaintiff, to prevent the chaise running against a waggon, pulled the horse sharp round, and in doing so drove over a lime heap opposite another man's door. This caused the shaft to break, and the horse becoming more frightened, ran away and upsetting the chaise threw the plaintiff out and injured him: it was held, that though the defendant was to blame for putting the rubbish beside the road, yet if the plaintiff's running against the second heap was owing to his pulling the horse sharp round, the immediate cause of the injury

Flower v. *Adam*.

(*d*) 2 Taunton, 314.

was his own unskilfulness in driving, rather than the original act of the defendant. Again, where the defendant hired the plaintiff with his horses to carry a load of timber to Ipswich, and the plaintiff took the timber as agreed, but by reason of the defendant not giving directions where to unload the timber, the horses—which were heated with their journey—by waiting took cold and some died, it was held the plaintiff's action was not sustainable. If the defendant was wrong in not finding a place to deposit the timber, the plaintiff was to blame for not taking his horses out and putting them into a stable (*e*).

Plaintiff cannot recover if he has shown negligence.

But while these cases go to show that a plaintiff will not be entitled to compensation for injury where he has shown negligence or misconduct, that negligence or misconduct must be such as the plaintiff is legally responsible for, and co-operate in inflicting the injury (*f*). As where the defendant left his horse and cart standing in the street without any person to watch them, and where some little boys were at play and some of the boys got into the cart, and another boy led the horse on to give them a ride, and one boy fell and got his leg crushed under the wheel, it was held that the defendant was responsible for the fall and broken leg, as it was the natural conse-

(*e*) *Virtue* v. *Adam*, 2 Lev. 196.

(*f*) See on this *Abbott* v. *Macfie*, 33 L. J., Exch. 177; *Mangan* v. *Atterton*, L. R., 1 Exch. 239.

quence of his misconduct in leaving the cart unattended, and the boy, from his age and the circumstances, could not be considered legally responsible, so as to be precluded from recovering compensation from the defendant. "If," said Lord Denman, "I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third party, and if that injury should be so brought about, the sufferer may have redress by action against both or either of the two, but unquestionably against the first. If, for example, a gamekeeper returning from his daily exercise should rear his loaded gun against a wall in the playground of schoolboys, and one of these should playfully point a gun at a schoolfellow and fire it off and maim him, the gamekeeper must answer in damages to the wounded party" (*g*). So, too, if a horse and cart are left standing in the street without any person to watch them, and a person strikes the horse and causes it to back against a shop window, the owner of the cart is liable for the damage, for he should have seen the risk of all the consequences that result from leaving the horse unattended. In such case, both the owner who left the cart, and the person who struck the horse, are liable for the injury (*h*).

Lynch v. *Nurdin.*

(*g*) *Lynch* v. *Nurdin*, 1 Q. B. 36.

(*h*) *Phelps* v. *Goodall*, 5 C. & P. 190

One of the most difficult questions to determine in trying actions of collision by vehicles, is the question of contributory negligence. The difficulty does not arise so much in the Superior Courts, where a case is generally well sifted in Chambers by summons, either for further and better particulars, or the like, but in County Courts, where ordinarily there are no pleadings, and the question has to be settled then and there from the statements of the advocates for the parties, and the evidence of their respective witnesses. The rule of the road is well understood, and an inference may be drawn, where one party is shown to have been on the wrong side of an imaginary line in the middle of the road, that the collision was owing to that party's negligence. Thus, if it is shown, or admitted, that the plaintiff was driving at a reckless pace on the right-hand side of the road, and his vehicle came into collision with another vehicle coming in the opposite direction, the driver of which was not looking out, the inference would be that if the plaintiff had been on his own side, the collision would not have taken place, and that if he sustained injury it was his own fault. In legal phraseology, he would have been guilty of contributory negligence, and a plaintiff cannot recover damages, if but for his own negligence, or that of the person who represents him, the accident would not have happened, although

Contributory negligence disentitles an injured person to relief.

there was negligence on the part of the defendant (*i*).

There may be, however, and frequently are, cases where the negligence on the part of the plaintiff is so remotely connected with the cause of the injury, that it cannot be called "contributory negligence" in the legal sense; in other words, where the negligence of the plaintiff, although admitted, did not actually contribute to the accident or injury,—the question then is, could the defendant, by the exercise of ordinary skill and care, have avoided inflicting the injury? If he could, the indirect negligence of the plaintiff cannot be set up by the defendant as an answer to the action (*k*): as where the plaintiff negligently left his donkey on the public highway, and tethered by the forefeet, and the defendant carelessly drove over and killed the ass with his horse and waggon in broad daylight—the donkey not being able to get out of the way,—it was held that the negligence of the plaintiff in leaving the ass on the highway was no answer to the action; for although the animal might have been wrongfully there, the defendant was bound to travel on the road with

A defendant cannot set up contributory negligence if such negligence indirect.

(*i*) *Hawkins* v. *Cooper*, 8 C. & P. 473; *Waite* v. *North Eastern Rail. Co.*, El. B. & El. 719; 27 L. J., Q. B. 417; 28 L. J., Q. B. 258; *Bridge* v. *Grand J. Rail. Co.*, 3 M. & W. 244; *Adams* v. *Lan. & York. Rail. Co.*, L. R., 4 C. P. 739; 38 L. J., C. P. 277.

(*k*) *Greenland* v. *Chaplin*, 5 Ex. 240; *Luckford* v. *Large*, 5 C. & P. 421.

care, and in such a manner as not to cause mischief. "Were this not so," said the Court, "a man might justify driving over goods left in a public highway, or even over a man lying asleep there, or purposely running against a carriage going along the wrong side of the road" (*l*). So, also, a driver should not drive round corners too fast; if he do so, and runs over any person, or comes into collision with a carriage, even although such person or carriage are not on their right side, he may find he cannot set up their wrongfulness as contributory negligence, in an action brought to recover compensation for injury (*m*).

Driver should be cautious in going round corners.

If a person, using ordinary care, is injured, or if his horse is injured, by falling over a heap on the highway, the person who left the heap will be liable for any injury. But if an obstruction has been negligently placed in a public thoroughfare by the defendant, and the plaintiff has ridden against it, he cannot recover damages from the defendant if it appears that he was riding at an improper pace or was intoxicated, and could have avoided the obstruction with ordinary and reasonable care. "Thus," Lord Ellenborough said, "a

(*l*) *Davies* v. *Mann*, 10 M. & W. 546.

(*m*) By the Court, in *Mayor of Colchester* v. *Brooke*, 7 Q. B. 375, "If a man drove furiously round a corner and injured a person on the further side * * would not an averment of negligence include all that was necessary to maintain an action?"

party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right" (*n*). If the risk is obvious, the plaintiff ought not to incur it, but should remove any obstruction or take legal proceedings for its removal. Of course a heap of any rubbish which might be seen by day would not be seen by night, and the same reasoning would not apply.

Owner of cart or carriage bound to have good harness.

The owner of a cart or carriage is bound to have strong and proper harness on the horse or horses used to draw the vehicle, and he is answerable for any accident that may occur through the harness breaking,—as where the chain trace of a cart broke, and the horse getting frightened ran away and did an injury (*o*); and where, in consequence of reins breaking, a foot passenger was run over and injured, as Patteson, J., said in *Cotteril* v. *Starkey* (*p*), "If a person driving along the road cannot pull up because his reins break, that will be no ground of defence, as he is bound to have proper tackle." So, again, where the defendant was driving down hill, and the horse he was driving, although usually quiet, commenced kicking and ran away, and at last the shafts broke, and the cart coming into collision with the plain-

(*n*) *Butterfield* v. *Forrester*, 11 East, 60.
(*o*) *Welsh* v. *Laurence*, 2 Chitty, 262.
(*p*) 8 C. & P. 693.

tiff's gig injured it, it was held that the breaking of the shafts raised a presumption of negligence in the owner of the cart, and he was held liable (*q*).

Foot passengers have a right to walk in the carriageway.

A foot passenger is not bound to keep on the foot pavement; he has a right to walk in the carriageway, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it. In *Cotteril* v. *Starkey* (*r*) the Court told the jury "a foot passenger has a right to cross a highway, and persons driving carriages along the road are liable if they do not take care, so as to avoid driving against the foot passengers who are crossing the road." And it was held in *Williams* v. *Richards* (*s*) that "it is the duty of persons who are driving over a crossing for foot passengers, to drive slowly, cautiously and carefully; but it is also the duty of a foot passenger to use due care and caution in going upon a crossing, so as not recklessly to get among the carriages." But it would appear that the Courts do not hold that the rule of the road applies to foot passengers. "The rule as to the proper side of the road does not apply with respect to foot passengers; and as regards foot passengers, the

And it is the duty of drivers to drive slowly at a crossing.

(*q*) *Templeman* v. *Haydn*, 12 C. B. 507.

(*r*) 8 C. & P. 693; see also *Boss* v. *Litton*, 5 C. & P. 407; and *Lloyd* v. *Ogleby*, 5 C. B., N. S. 667.

(*s*) 3 C. & K. 82; and see Erle, C. J., remarks in *Cotton* v. *Wood*, 8 C. B., N. S. 571.

carriages may go on whichever side they please" (*t*).

Rule of road not applicable to foot passengers.

But the rule of the road as to keeping the proper side applies to saddle horses as well as to carriages, and if a carriage and horse are to pass, a carriage must keep its proper side, so must a horse (*u*).

Still, as before said, the rule of the road, that a driver should keep on his own side, is not absolute. If a driver does not do so, he must be cautious, and the degree of care sufficient for a driver on his own side, will not be sufficient if he is on the wrong side (*x*). So a person has no business to drive on the wrong side of the road in the dark; if he does so, and injures the carriage of another person, he is answerable for it (*y*). It is generally better to keep on the proper side in driving, in any event, but there may be circumstances where by pulling over to the wrong side a collision may be avoided, such as where a driver meets a loaded conveyance coming down a hill, which is too heavy for the horses; or where a carriage is seen approaching, the horses of which are manifestly running away; for although horses will of themselves keep their proper side and avoid contact with other vehicles, although their driver may be asleep, it is otherwise when horses are running away; their doing so is generally the

(*t*) *Cotterill* v. *Tupp*, ubi supra, by Mr. J. Patteson.
(*u*) *Ross* v. *Litton*, 5 C. & P. 407.
(*x*) *Pluckwell* v. *Wilson*, 5 C. & P. 375; and *Lloyd* v. *Ogleby*, 5 C. B., N. S. 667.
(*y*) *Chaplin* v. *Hawes*, 3 C. & P. 554; *Handyside* v. *Wilson*, 3 C. & P. 530; *Leame* v. *Bray*, 3 East, 593.

result of fear, and a frightened horse often becomes totally unmanageable, and it may be said, forgetful of all he has ever learnt or practised. In *Clay* v. *Wood* (*z*) the defence was that the plaintiff's horse was on the wrong side of the road when the collision took place. It appeared that as the plaintiff was driving along, the defendant drove his chaise out of a cross road, and in trying to cross over to its right side, ran against the plaintiff's horse and broke its leg; and Lord Ellenborough ruled, that though a person may be on the wrong side of the road, if the road was wide enough, so that there was room for another party to pass, the latter was bound to take the course which would clear the person on the wrong side, and that if an injury happened by running against such person he would be answerable. A person being on his wrong side of the road would not justify another in wantonly doing an injury which might be avoided. Still if persons driving meet on a sudden and an injury results, the party on the wrong side is answerable, unless he can show that the driver on the right side had ample opportunity to prevent the accident (*a*). It need hardly be added that in every case in which a servant is acting within the scope of his employment and drives negligently the master is liable, and that the same rules for driving and riding apply to servants as well as to masters.

Rule of the road not absolute.

(*z*) 5 Esp. 42. (*a*) *Chaplin* v. *Hawes*, 3 C. & P. 554.

CHAPTER IX.

THE DISEASES AND AILMENTS OF HORSES WHICH LEGALLY CONSTITUTE UNSOUNDNESS.

Of Unsoundness and Vice.—In a former chapter the definitions of soundness and unsoundness have been given. It is proposed now to say something respecting the diseases of horses which clearly constitute the latter defect, not as suggesting that in any litigation the evidence of the complainant, as derived from any legal book, can be of value from a scientific point of view; but to enable any one who thinks he has been wronged in a horse transaction to see whether he has or has not a remedy against the person supposed to have wronged him before he embarks in a lawsuit.

The veterinary art has very much improved of late years. Veterinary surgeons now know what they are talking about: but still, in rural parts, the ignorance respecting the real diseases of animals, is great. Many farriers are natural healers of animals, just as many doctors are natural healers of men; from practice and long watching, and a natural aptitude for the work, they effect marvellous cures, and yet would be unable to pass the most simple examination on the anatomy of

any part of a horse. When then an action is commenced on the advice of such men it often fails, for in giving scientific evidence they make exhibitions of themselves which are very ludicrous. In Dorking County Court a farmer once brought an action against a smith for ill-shoeing and killing a horse of his recently purchased. The actual facts were, the horse was bought with long standing laminitis, or fever in the feet, and without shoes; in shoeing the animal it is possible he was pinched and the disease intensified and the horse died; but the farrier produced in court the coffin bones of one of the horse's feet much corroded and eaten with disease, which he supposed, and said, were so injured by the nails used when shoeing the unfortunate animal, as if that was possible. To afford, then, some sort of guide to any one alleging that a horse sold to him as sound, is, or was unsound, it will be useful to consider from the symptons, or from the statements of the veterinary surgeon—is the disease one which constitutes unsoundness in law? and have there been any decisions to that effect in relation to such particular disease?

It may be taken for granted that most horses rejected for breach of warranty, are so rejected because of lameness, and lameness arises from defects, diseases, or malformations of the feet or legs. As a rule, a horse that is lame in its forelegs is injured in the feet, and if it is lame in the hind

legs the cause is somewhere in the stifle joint or hock, the knee of the hind leg. The reason of this is obvious. If a gentleman uses a straight walking stick when going about his grounds, he will find the stick wear at the point, so the straight or foreleg of a horse wears at the point. If, however, a crooked stick, or one with a joint, is used, it will be observed to bend and give at the joint, leaving the point wholly unworn, and it is so with a horse's hind leg; the wearing and injury usually occur at the joint of that leg, the foot remaining uninjured. And it is well to remember this, because a person rejecting a horse for lameness should be able to say something, though not technically, of his reasons for doing so. To say that a horse is lame in his hind feet, but is sound on his forefeet, although possible, does not impress a jury of farmers as a common sense remark; they know, although they cannot tell why, that such a thing rarely happens—that if a horse goes sound in front and is lame behind, and the cause is in the foot, that it has been pinched in shoeing, or had a blow, or has suffered some temporary injury there, which they will not look upon as unsoundness, but as an injury easily remedied, and arising from the buyer's own fault.

The common diseases of the foot in a horse, which are manifestly unsoundness, are corns; grogginess, or navicular disease; laminitis, or fever in the feet; thrush and contracted feet.

Corns in horse's feet, symptoms of.

Corns.—These occur in a horse generally in the forefeet, in the sensible sole, between what is called the bar and the quarters, or nearly under the heel of the shoe. They have been held to be unsoundness in a horse, and if they cause, or are likely to cause, lameness, would be so; but if a horse's corn is carefully pared, before it is sent for sale, the corn will not affect the animal's action for many days, and will not be soon discovered. If a horse is suspected to have corns, the foot should be pared in the heel or part mentioned, and if there is a corn there, it will be seen by the redness of the horn, as if the blood was suffused. If the part is pinched, as all smiths know how to try a horse's feet, with a pair of pincers, the horse will at once wince. From such a corn, a horse is likely to go lame at any time. A red or bruised appearance is not always a corn; a horse may tread on a sharp stone and bruise his feet, and become lame for a day or two, which will, however, go off, but the redness remains for many weeks. An accident of this kind is not at all unlikely to happen to a young horse bought at a fair, and should not be confounded with corns or other permanent injury to the sole of the foot. Corns may be cured, if not of long standing, by great care in shoeing. If a corn has developed into quittor, or gathering and suppuration of the foot, it is not to be cured, and renders the horse unsound for life. This is sometimes called by grooms a "festering corn."

Navicular disease, description of.

NAVICULAR DISEASE OR GROGGINESS.—This is another disease affecting the foot of the horse, and is so called because it arises from an injury to the navicular bone, a small bone in the foot of a horse above the frog. Strictly speaking this disease arises from inflammation of the synovial membrane, which covers the navicular bone. A horse with navicular disease is unquestionably unsound. The symptoms mostly are heat in the feet and lameness at starting to walk, with low action and wearing of the toe of foot. But the most remarkable sympton, perhaps, is pointing the toe—that is, the horse puts out the foot diseased in front of the other foot, and rests the leg on the heel. This is a disease which does not show so much when a horse has become slightly warm from exercise, and many a wretched poster will come lame out of the stable, and in a few miles, warm up to comparatively sound action. This disease in a horse is called grogginess when it has so far developed as to cause the animal to knuckle over on the pastern joint, and to stand with a tottering or shaking movement; hence probably the term, grogginess.

It is said that a horse can be cured of this complaint by severing the nerves of the foot, or what is called "nerving;" but although a horse, after such an operation, will do light work well enough, it will be sure to break down if put to hard work, and a nerved horse is by decision held to be an

unsound horse, nerving being an organic defect. See *Best* v. *Osborne* (*a*).

Laminitis, description of.

LAMINITIS, OR CHRONIC FEVER IN THE FEET.— This disease, as it alters the structure of a horse's foot, is undoubtedly unsoundness. Sometimes this defect is called, chronic founder. Properly speaking, fever in the foot is the commencement of laminitis, which is, really, inflammation of the sensible laminæ, which connect the coffin bone with the crust of the foot. More horses are rejected as unsound on account of this disease than from any other cause, and not always with reason, as the development of fever is very rapid. It happens that a horse is kept well to prepare the animal to go to a sale or fair. It is known that the majority of horse buyers think more of condition of flesh than of condition of muscle; so flesh is put on a horse before it goes for sale, by all sorts of food, at the expense of possible inflammation. Even dealers think a fat horse, with a sleek skin and a long tail, more worth looking at than another whose ribs may perhaps show, but whose crest and withers feel like real condition. The consequence is, many horses sent for sale are predisposed for fevers of all kinds. After standing about in rain or snow for hours, and after having been run up and down, as the saying is, they go

(*a*) R. & M. 290; 2 C. & P. 71.

to the buyer sound, but with the seeds of disease. Then the new owner cannot make too much of or feed his purchase too well. In a few days, or perhaps next morning, the horse shows signs of inflammation in the feet. In such a case as this, it is probable that a disappointed buyer will fail to recover on alleged breach of warranty; it may be that disease is no fault of the seller, or, at all events, had care been taken, no fever would have come on. In most works on farriery a distinction is made with reference to laminitis, this complaint being divided into two stages and called acute laminitis and sub-acute laminitis; as a fact, acute laminitis is fever of a violent character in the feet of a horse—sub-acute is the chronic stage, and whether these can be cured or not is of little matter, for they detract from the natural usefulness of a horse, and are unsoundness. It is, however, material that a person before he goes to law, should consider the grounds on which he founds his complaint. If the disease has come on since the purchase, and from any of the causes above hinted at, he, as was said before, may fail to recover back his money from the seller: on the other hand, if the disease was of long standing, the horse has been sold unsound, and, if warranted, can be returned or the money recovered back. Assuming that such is the case, and a buyer thinks he has been defrauded or wronged, what are the symptoms we should look for as differing, although

Acute and sub-acute laminitis.

only in degree, from a disease contracted at the time of, or subsequent to, the sale? In the case of recent injury, not chronic, the animal may come into the stable, looking fresh, and feed well; the hoofs will appear of the proper size and shape, and everything appear right until the morning after the new horse has come home; it will then be found with staring coat and eyes, resting the weight of the body on the heels of the feet and refusing food; or, probably, the animal will be lying down, especially if in a horse box, its sides will be heaving as if the wind was touched, and to the most inexperienced eye the horse will appear ill. These symptoms may also occur in a horse who has long had chronic laminitis; but there will generally be this great difference—the hoofs of a horse with chronic fever in the feet never remain shapely and open, but become contracted and narrow; often too, a horse with chronic foot fever has a bad thrush, or discharge from the centre, or split in the frog of the foot. Some hunters suffer after every hard day, more or less, from fever in the foot. An excellent Irish horse was ridden a long run with hounds, and the end of the run found horse and rider twenty-five miles from home. The horse, formerly ridden by a whip, came home at his own pace, which was the jog-trot at which hounds like to travel on the roads. On coming through the lodge of the owner, the animal appeared so fresh and well that it made a playful

Symptoms of laminitis.

spring and lashed out at a boy who opened the gates, nearly unseating his rider; but as soon as the groom saw the animal's eye, he foretold that it would be down with foot fever before the morning, an opinion which was fully verified, and it was only by great care and watching that the horse was brought round again. This horse was sound the day of the run, but was not in a condition to sell as sound the day after, although in a fortnight he had quite recovered.

Symptoms of chronic laminitis.

In chronic laminitis, a horse is always dull and stiff at starting and first coming out of the stable. This lameness, or stiffness, will sometimes work off, but it will come on again with rest. The animal's appetite, however, is not so much impaired as in acute fever. This disease is not always easy to discover. Sometimes it will be days before even a veterinary surgeon finds out exactly the seat of the disease. It not unfrequently happens that a horse is bought in a fair or at a sale when warm, and shows no sign of lameness; the buyer takes it home and next morning finds his purchase lame; then any slight exercise, even the taking it to a veterinary surgeon, causes the lameness to pass off, and the buyer hesitates to return his bargain. May be, that the horse, being equally lame on both forefeet, does not show that drop which is the peculiarity of lameness in four-footed animals, and the buyer thinks he was mistaken and keeps the purchase a few days more. At last,

he comes to the conclusion that the horse he has bought warranted as sound is unsound, and takes steps to get back his money when too late. It is a case of chronic laminitis; but the horse is rejected, after too long a delay, to obtain any remedy. The buyer of a horse with suspiciously contracted forefeet, or with a thrush, or with leather-shod forefeet, should always require a warranty to last a fortnight.

Thrush. THRUSH is an offensive discharge from the cleft of the frog, which rots away the frog and causes the horse to feel tenderness when treading on a stone. It is produced by moisture and filth, and thus it is more common in the hind than the forefeet. Sometimes it is produced in the forefeet by contraction and fever in the feet. A horse with thrush is unsound.

Diseases of feet. CONTRACTION OF THE FOOT.—When this is sufficient to cause lameness in a horse, the animal is unsound. It is in itself very often the result of unsoundness, more especially of fever in the feet. Rings in the hoofs are often supposed to be marks of unsoundness; they may be, but are not necessarily so. Rings come on horses' hoofs in this way: when a horse is feverish in the feet or system, be the cause what it may, the hoof gets hot and dry and does not grow. As the fever lessens, or, as the body cools from other reasons, such as being

turned out to grass, or a change from heating to cool food, the horn of the hoof will make a sudden start and grow very rapidly; and, if from any cause this growth is again stinted, a ring will be formed, more or less broad, as the growth has had more or less time to develope. It is surprising how the application of some unguents to a horse's hoof, combined with green food, will develope the growth of horn. The well-known Hoplemuroma of Mr. Clark, commonly called "Hops" in stable parlance, if rubbed into the coronet of a horse's hoofs regularly, will sometimes occasion so rapid a growth of horn as to look like a diseased protuberance, while all the while the horse operated on is perfectly sound and improving in the feet. Rings are not, therefore, always signs of disease; still, as a rule, anything abnormal in the feet, such as a ring or a contracted castlehoof, indicates, more or less, disease or fever in the feet of long standing, and, if combined with lameness, may be distinctly classed as unsoundness. Some other defects and diseases of the feet are patent and visible to the eye of an ordinary observer, such as sandcrack and grease. There can be no concealment of either one or the other of these diseases; both may impair the natural usefulness of a horse, and, therefore, be unsoundness; but both can be cured, and are generally the result of low condition, caused by bad grooming and insufficient food. *Sandcrack* is a crack or split in the hoof of a horse,

Advantage of using unguents.

from the sole upwards, sometimes extending up the whole length of the hoof, from the sole to coronet. *Seedytoe* is another form of sandcrack, but comes on at the toes of the horse only, as its name indicates. No horse can be said to be sound with either one or the other of these defects, and it is only where a horse is bought on a warranty, without being seen, that questions are likely to arise in either of these diseases. *Falsequarter* is a term applied to sandcracks where they have been much developed; but, as a fact, it is not always due to that cause. A wound or injury to the coronet of the foot will occasion a disunion and a sore between the foot and the leg, so that the foot is no longer of use in supporting the weight of the body. This, when it happens, lames a horse, and is necessarily unsoundness.

Grease in horse's heels.

Grease is another disease affecting, generally, the heel of a horse's foot, and more usually the hind feet than the forefeet. Grease is often the result of neglect and dirt, but sometimes arises from over-feeding. It is generally preceded by swelled legs; after a while the heels become red and dry, the natural oiliness of the heel and of the skin under the pastern joint seem to dry up, and, unless attended to, the part ultimately becomes ulcerated and very painful when the horse moves. If a horse is bought with this disease on him and with a warranty of soundness, it can be returned;

for although this disease can be easily cured, it is a serious detraction from the animal's utility until so cured. Grease is not always the result of neglect; an injury to the tender skin of a horse's heel will bring on inflammation and grease. One case, in which a hunter cut himself with a flint under the near hind pastern, turned to grease and took months to cure. Another case, where a four year old colt got his forefoot over the halter strap and chafed the skin under the pastern joint, resulted in such a bad attack of grease that it threw the colt out of work and blemished him for ever afterwards.

Any natural malformation of the foot is not unsoundness; thus, some horses are very flat-footed, and thereby are bad travellers, and if they tread on a stone, go lame for a few steps.

Thin soles not unsoundness.

So, also, some horses have very thin soles to their feet; if these are incautiously pared by a shoeing-smith, who is ignorant of the fact, or of his business, a horse may go very lame for awhile. A case of this kind was tried before Mr. Justice Cresswell (*Bailey* v. *Forrest*) (*b*), where he pointed out to the jury that if this defect did not produce lameness at the time of sale, the peculiar formation —that is, thin soles—was no breach of the warranty that the horse was sound.

Diseases of a Horse's Legs.—The principal

(*b*) 2 C. & K. 131.

defects and diseases affecting a horse's legs are splints, spavins, and ringbone, swelling and strains of the tendons. Broken knees are more the effect of accidents than disease, but they undoubtedly are defects.

Ringbone. RINGBONE is a disease mostly affecting the pastern joints of horses; it shows itself in an enlargement of those parts, and ultimately causes the whole leg, from the hoof to the knee, to appear as one piece without any joint, having no bend or flexion. This is necessarily unsoundness. Most horses employed about railways become badly affected with ringbone on the hind pasterns. The heavy coaches and trucks they are required to move, when making up a train, glide easily enough when once set going, but it strains horses fearfully to start them, and sooner or later destroys the horse's motion of the hind legs.

Splints. SPLINTS.—A splint is a bony deposit or excrescence on the leg of a horse, between the knee and the pastern joint, sometimes on the splint bones, sometimes on that bone called a horse's cannon bone. A horse with a splint may or may not be unsound, as the splint causes, or does not cause, or is not likely to cause lameness. If this bony deposit or lump is well forward out of the way of the tendons, and not near any joint, it will not affect a horse's action, and is not unsoundness.

The cannon and splint bones of a horse are the same as the shin-bone of a man, and would appear to be very sensitive to injury or pain, so that a blow received by a hunter in going through instead of over a gate, or in touching the top stones of a wall, will often result in a splint that will in no way impair the animal's usefulness. Where, however, this bony lump occurs at the back or hind part of the bone, or near the joints of the leg, so as to interfere with a horse's action, then a splint is unquestionably a defect which is unsoundness. Splints are, with many horses, hereditary. In a part of the country where a thorough-bred horse with bad splints was much used, all his stock were liable to splints, and some foals even threw them out before they were broken. A splint, although well forward and out of the way of sinews and joints, may be unsoundness. A gentleman had a hunter, an excellent horse, but which was apt suddenly to fall dead lame. The veterinary surgeons were at a loss to find out what was the cause of this lameness, which did not continue for long, but spoilt many a run; for although the horse had a splint on the leg which gave out, it was so far forward as not to interfere with any tendons. It was suggested to the gentleman that possibly the horse when leg weary, struck the splint in his gallop with the other foot, and the pain caused the temporary lameness. After that, the horse was ridden with a side boot on the

splint, and although it never dropped quite so lame as before, it was no cure, and the way the boot wore showed the suggestion to have been correct. Such a splint would be unsoundness, as it would be a structural defect affecting the horse's action. Splints usually appear, on the inside of the forelegs of a horse, and on the outside of the hind leg. Some veterinary surgeons attribute this to the fact that there are more veins and arteries on the inside of the foreleg and the outside of the hind leg, and that these defects follow the distribution of blood. This may be so, but it is also probable that blows or kicks in action, which certainly cause splints, are received more on the inside of the forelegs and outside of the hind. The leading case on splints on horses legs is *Margetson* v. *Wright* (*c*).

Spavins.—This term is applied to certain enlargements of the stifle or hock joint of a horse; a bone spavin is in reality a splint or excrescence on the splint bone of the hind leg. A spavined horse is said to be unsound whether the spavin cause lameness or not, and it was so held in *Watson* v. *Denton* (*d*); but it is doubtful if such would be held as good law now. Spavins do not always detract from the natural usefulness of a horse, Spavin.

(*c*) 7 Bingham, 603; *Dickenson* v. *Follett*, 1 Moo. & R. 299.
(*d*) 7 C. & P. 86.

which is, as has been often said in these pages, the test of soundness or otherwise. Many good racers and almost all seasoned hunters have spavins, which neither detract from their speed or jumping qualities. A good judge will perhaps guess a horse is spavined by the action of the hind leg, even without feeling the hock, and on examination of the hind foot will find the toe unfairly worn, as is the case with spavined horses generally; but to an ordinary observer the action is all that is necessary or wanting. Still, if a spavin causes actual lameness, or makes the horse come stiff out of the stable, or when starting, especially if such a spavin be high up and near the joint, such a horse must be said to be unsound. Another defect in a horse, occasioned by spavin, when near the joint, is that the animal does not like to lie down. However diseased a horse may be in his forefeet, it will lie down and rest; but a horse with a stiff hock is afraid to rest on its side, the strain on the hock joint in rising, no doubt occasioning great pain, and preventing the animal getting that relief which rolling and lying give. For this reason, a team of coach horses with diseased forefeet will do half as much work again as a team spavined, and with stiff hind legs. The place to look for a spavin is inside the hock, and as many horses do not like a stranger fingering them about that part of the hind leg, a person wishing to satisfy himself that the animal he is rejecting really has a bone

Spavin not always easily detected.

spavin, should have one of the horse's forefeet held up during the examination. There are other sorts of spavins, called bog spavin and also blood spavin; these are not hard or bony excrescences, but look like wind galls or bladders, and are occasioned by hard work—such a defect is not unsoundness in itself; if a horse is lame from such a cause when sold with a warranty it would be, but many horses throw out these puffy excrescences both on the hind and forelegs, without ever suffering any inconvenience from them.

Curb.

Curb.—A curb is an enlargement or lump at the back of the hock of a horse, generally about three or four inches below the point of that joint. A horse with a curb is unsound, although not lame; in fact, many horses with curbs are not lame. If a horse is sold with a general warranty and has a curb, the animal can be returned to the seller. If the curb be pointed out at the time of sale it will be a special warranty, and the buyer must look out. It is seldom that both hocks of a horse are similarly curbed; if, therefore, the buyer stand at right angles to a horse behind and sees this swelling or enlargement, he should require a warranty against future lameness within a reasonable period, as well as against present lameness. Veterinary surgeons call a certain kind of hock a curby hock, and allege that horses with hind legs of that character invariably throw out curbs at

some time or other. In *Brown* v. *Elkington* (*e*), the plaintiff brought an action for breach of warranty on the ground that at the time of sale he objected to the horse's hocks as weak and as likely to throw out curbs. There was no special warranty given by the defendant, but a general warranty was admitted. A few days after the sale the horse threw out a curb; there was no allegation of lameness, but the plaintiff relied on the scientific evidence of veterinary surgeons that curbs are unsoundness. The judge, in summing up, told the jury "that a defect in the form of a horse at the time of sale, although it might render the horse more liable to become lame at some future time, was not a breach of warranty;" and on a new trial being applied for on the ground of misdirection, the court refused to grant it, and quoted *Dickenson* v. *Follett* (*f*), the judgment in which laid down that badness of shape was not unsoundness, so long as it was badness of shape only; where the shape produced an injury, then, and not till then, was the horse unsound.

Bad shape is not unsoundness.

This brings us to another defect in a horse caused by malformation, namely, *cutting or brushing the fetlock* joint of one leg by the shoe or foot of the other. This is sometimes caused by bad shoeing. The writer will never forget the satisfaction of a country smith on its being shown to him that if he

(*e*) 8 M. & W. 132. (*f*) 1 M. & R. 299.

pared the outside of a pony's hoof instead of the inside, so as to make the animal stand slightly bow or bandy-legged, the foot and shoe of the other leg would not touch it, and a bad cutter he quite cured.

Broken knees.

Broken Knees of a horse are, as their name indicate, the result of an accident or fall, and when the knees are so badly broken as to allow the joint oil, called the synovial oil in farriery, to escape, the horse becomes unsound. Sometimes even when this is not the case a horse cannot be said to be sound, because the action of the knees become impeded from the skin over the knees thickening. This, however, only occurs when a horse has fallen down very often, and, it may be said, that when that frequently happens, the knee joints get opened and the horse becomes radically unsound.

Broken down, defined.

Broken Down.—A horse is said to have broken down when it has suffered such a strain on the sinews and tendons of the leg as to cause temporary lameness and swelling of those parts. If a horse has recently broken down the injury cannot be concealed, because the part affected becomes very much swollen and inflamed; but, by careful fomenting, it is possible to reduce the swelling so as to conceal it from an ordinary observer. A broken down horse is decidedly unsound; any enlargement of the tendons must be a structural

injury to a horse, and more or less impair his natural usefulness.

Stringhalt.

STRINGHALT is a curious jerky action of the hind legs of a horse, which cannot be mistaken if once seen, and is incurable. A horse with this defect is unsound.

Diseases of the body and lungs.

DISEASES OF THE BODY AND LUNGS.—It is not probable that many of the diseases of a horse's body will become the subject of dispute in case of a breach of warranty; for this reason, they are generally diseases which show themselves at once, and are of such a nature and character that no person of ordinary intelligence could help remarking them at time of sale or as soon as they saw the animal in question. For instance, colic and gripes of the stomach are evidently so painful to a horse that it throws itself on the ground when attacked and rolls in agony, and so with other internal complaints of those organs. From this class, however, a distinction may be made in the case of *nephritis*, or inflammation of the kidneys, or any disease of the urinary organs. No animal is more subject to diseases of this class than the horse, and there are many reasons for it. The water given to horses is often drawn from all sorts of sources rather than from a pond, the natural watering place of a horse. The hay used for horses is, as a rule, so mow-burnt, that the wonder is not

that some horses are diseased in the kidneys, but that there are any horses without such disease. And so with corn,—there is no more prolific source of kidney disease in horses than bad oats. Add to this the habit grooms have of giving horses nitre and antimony, and the causes of this complaint can be easily understood. A horse with kidney disease is undoubtedly unsound. But unless a warranty with a horse extends for a longer period than usual, it will be difficult to ascertain the fact of such disease. Should any buyer of a horse think the animal he has bought suffers from any such complaint, he should take the advice of some really good veterinary surgeon before going to law about it. Nothing is more deceptive than disease of this nature; a few grains of nitre will for awhile relieve a horse badly attacked with chronic inflammation of the kidneys, so that he may work on as accustomed to do for months, if not years, and the evidence of disease be so unsatisfactory that a jury would not listen to it. On the other hand, a good veterinary surgeon will give his opinion on this immediately. Many a horse is found dead in the stable who was working the day before, and if the kidneys had been examined, the cause of death would have been very soon recognised, and surprise expressed that the animal lived and worked so long. *Diabetes*, *spasm of the neck of the bladder* and *cystitis*, or actual inflammation of the bladder, are by no means un-

Bad oats prolific cause of disease in horses.

common diseases of the riding horse. Most, if not all these complaints arise from the animal not having the opportunity, or not taking the opportunity, to pass water; but by retaining it very often for hours after the desire to void it has arrived, bringing on one or other of these diseases. Cart horses, for obvious reasons, are seldom troubled by these complaints unless kept on mouldy hay or corn. If after a horse is purchased any suspicion of these diseases occur to the buyer, he should tell the groom to watch and call in a good veterinary surgeon to ascertain the fact, for these complaints are most subtle, and will spoil the best of horses.

Broken wind.

Broken Wind is a term given to a disease of the horse affecting the air cells of the lungs and the intestines generally. It is unquestionably unsoundness. There are different stages of broken wind, but any groom or person experienced in horseflesh knows the disease at once. It is not always easy to detect this from watching a horse's flank when it is in its early stages; but there are one or two other symptoms which, combined with a heaving action of the flank, may be taken as fair indications of broken wind—one is a peculiar cough, especially if after drinking; another, that the horse when eating its corn and chaff, never clears its nose. If a sound horse is listened to in the stable, it will be heard constantly clearing its

nose with a sort of snorting sound, to get rid both of the dust, hay seeds, and other light particles flying about. A horse slightly broken-winded, touched in the wind as the saying is, may do this; but if it does not do it, the animal may be put down at once as so diseased. It is said that dealers are able to give horses something that will temporarily relieve a horse with broken wind, and so enable them to sell and get rid of them to the unwary; and this is very possible, for a horse on grass will not show broken wind in anything like the same degree as it will if kept in a stable; still, this is a disease which is at once recognised by an expert. Pinching a horse in the gullet and making him cough is no test of broken wind. The soundest colt bred will cough if half throttled, and so, probably, would a man also. Broken wind is unknown among horses in India.

Coughs. Coughs.—Horses are very subject to coughs, whether arising from inflammation in the head and throat, or from the lungs, or when the seat of disease is broken wind. A horse with a cough is unsound. In *Bolden* v. *Brogden*, a different doctrine was laid down, and for some time it was held as law that if a horse suffered from a temporary injury, as in this case, only, such as a cough, it was not unsoundness; but since Baron Parke's direction to the jury in *Coates* v. *Stevens* (*g*), it has

(*g*) 2 M. & R. 157.

been held otherwise, and this is to be noted because from the evidence it would appear that the cough, which was the alleged breach of warranty in that case, had been cured before trial. A cough is a disease which need not be described, its symptoms are plain enough; but a person dissatisfied with a bargain he has made in horseflesh should bear in mind that a cough may be contracted by a horse in a few hours after the time of sale, for, as has been before stated, the place and conditions of the localities where horses are often sold, are provocatives of inflammation and colds. Some horses, especially nervous animals, always catch a cold if they are a night away from their own box.

Roaring and whistling.

Roaring and Whistling are diseases of horses generally the result of a cough or cold. The noise made by animals affected with these complaints is caused by a contraction of the larynx and windpipe, after strangles or bronchitis, influenza or such like ills of horseflesh. Some old cases in the law books are quoted to show that roaring is not unsoundness, but it is submitted that these decisions are not in accordance with common sense. A roarer is not to be depended on, its structure is injured more or less, and no persons know this better than racing men. If a Derby favourite is heard to make a noise, it goes back in the betting at once. It is known

the animal is suffering from structural injury, and, as has been repeatedly shown before, that is a certain test of unsoundness. On this defect the case of *Onslow* v. *Eames* (*h*) should be read, where it was decided that roaring was a malady which rendered a horse less serviceable for a permanency, and, therefore, unsound. This decision was qualified in *Bassett* v. *Collis* (*i*), but the latter case is doubtful.

Diseases of the Head and Throat.—In treating of broken wind, reference was made to coughs. These may proceed from the lungs or intestines, as in broken wind, or from the throat, as in bronchitis, and it will not be necessary to say anything further here respecting coughs than that they are unsoundness. The principal disease affecting a horse's head are glanders, strangles, influenza, catarrh and blindness.

Glanders pronounced to be incurable.

Glanders are, of course, unsoundness. The symptoms in the advanced stage are unmistakeable. The disease is incurable; but sometimes a horse is alleged to be glandered when it is only suffering from strangles or catarrh. A horse does not become glandered in a few hours, that is, with the disease fully developed; the complaint is one that takes some time to come out. If, however, a

(*h*) 2 Starkie, N. P. C. 81. (*i*) 2 Campbell, 522.

buyer finds his purchase running at the nose with that peculiar discharge which a farrier tells him is glanders, he should take steps to rescind the bargain and get his money back. A person with a glandered horse should not attempt to re-sell it; when the animal is pronounced to have this disease it must be destroyed, and the buyer can recover the full price, and, possibly, damages also from the seller, if it can be proved that the latter knew, or ought to have known, the horse he was selling had this fatal complaint.

Strangles common to all horses.

STRANGLES are a disease common to all horses, especially young animals, and is often mistaken for glanders. To the inexpert the symptoms are the same, but more violent in strangles while they last. The horse appears to have a bad cold, its head and throat swell, and after a while a copious discharge takes place from the nostrils. It is sometimes difficult to get a young horse in condition before it has had strangles, at least, in the same condition as after strangles. It would appear as if this complaint carried off some virus in the system, and is a great relief to young horses. A horse with strangles is unsound; but it is a complaint which comes on very suddenly, and the same circumstances which give a horse a cough or cold at, or just before, the time of sale, are likely enough to bring on strangles. If a purchaser thinks the animal he has bought has strangles, he

should consider well what he does. In more than one case, which has come under the observation of the writer, a young horse has been sold sound, that is, with no cough or cold out, and taken to the home of his new master; when there, strangles have come on, which would have been easily got over had the animal been properly nursed and fairly treated; but, owing to the disputes usually arising out of such a circumstance, the horse has been neglected, and that which would have been the means of relieving the animal's system, and perhaps curing it of incipient blindness, has, unhappily, by neglect, turned into chronic cough or indigestion, and perhaps total blindness. No persons know better than farmers, of the class who compose juries, the symptoms of strangles, and they are not disposed to lean towards anyone who loses a young horse in this complaint, and who sticks too closely to a warranty under such a state of circumstances. Still, just as has been said of a temporary cough, so it must be said of strangles—they are both unsoundness, only a complainant should be cautious in dealing with a case of warranty where the alleged breach is certainly strangles.

Blindness. BLINDNESS.—All affections of the eyes, which detract from their normal state and make a horse more or less blind, are unsoundness.

Vice. VICE.—A horse is said to be vicious when it has a *dangerously* bad habit, that is, dangerous to those who have to do with the animal, or dangerous to itself. Rearing, kicking, and biting are manifestly vices, as they are dangerous to persons who have to attend to a horse; so, too, jibbing and running away are vices, if habitual. Some people class rolling in the stable, turning round in the stall, and such like proceedings of a horse as vices; but it would be difficult to persuade a jury that they were dangerous or injurious habits, and therefore, they will not be here put down in that category. *Crib-biting* and gnawing the manger are bad habits, and are sometimes classed as vices, as they are supposed to injure the horse itself. If they do so they are unsoundness, because anything which renders a horse less useful than nature suggests, is unsoundness.

There are many other diseases and defects in horses than those before enumerated; but, practically, it will be found that the diseases and defects mentioned in the foregoing pages are the diseases in ninety-nine cases out of a hundred which form the cause of dispute in buying or selling horses. In all diseases of dumb animals, a great difficulty must occur from their not being able to tell the tale of their own symptoms; but farriery or the veterinary art has of late years so much developed, that a complainant should have

no difficulty in procuring evidence to tell a judge or jury what is the matter with the horse he would reject, and in offering a comparison between the symptoms of disease in the object under dispute and the diseases of other horses which have been subject to judicial decisions, and where such diseases have been held to be unsoundness.

CHAPTER X.

HOW TO PROCEED IN CASE OF DISPUTE IN A HORSE DEAL.

Procedure in the County Court.—The preceding chapters of this work have been devoted to an exposition of the law respecting the warranty of horses. It is now proposed shortly to state the best method to proceed in County Courts, where a person having bought a horse afterwards finds it not up to the warranty given, or to the representations made respecting it. If the horse which has been purchased is very valuable, the probabilities are that some solicitor will be employed for the person disputing the bargain, and, in that case, most likely the litigation will take place in the superior courts; but as one of the great sources of litigation in rural county courts are disputes respecting horses of a comparatively small value, it is hoped that this chapter may be of use.

If, then, a person has bought a horse for any sum of money less than 50*l.*—which is the highest sum that in a dispute of this kind can be referred to a county court—and, when this horse was sold to him, was sold with a warranty, but on inspection and trial has been found not to be of the

nature and character stated, and the buyer wishes to rescind the bargain; the first step taken should be to call in an experienced veterinary surgeon, and to obtain from him a certificate of the animal's unsoundness (if that is the point with which the buyer is dissatisfied); or, if the complaint is that the animal does not come up to the warranty and statements of the seller in other respects—as, for instance, if the horse was warranted free from vice, or to be quiet to ride and drive, and proves to be vicious or restive—then to take the opinion of some authority, such as an experienced coachman or stud groom, with respect to the horse's vice or restiveness, and, if possible, to get that opinion set out in a written report. This being done, the buyer should at once either write and inform the seller that the animal is not as warranted, or send the horse back to him, if he can, with a copy of the certificate or report; or, if no note or writing can be got from experts, as above suggested, then with a letter from the buyer demanding back his money. The buyer can, also, demand payment of such a reasonable sum of money as may be sufficient to cover the expenses incurred owing to the alleged breach of contract (*a*). If the seller refuses to take back the horse, the buyer should then take prompt steps to

(*a*) If the purchaser sue upon the warranty he need not return the article bought, but the better course to adopt is that recommended at p. 64, ante.

sell the animal by auction, giving due publicity to the sale, and then sue the seller for the difference between the amount received on the sale of the horse, (having first deducted all fair expenses incident to the sale, &c.,) and the price actually paid in the first instance for it. If any correspondence takes place, care should be had that all letters received, be kept, and also copies of all letters sent, as their production at the trial may help the Court in coming to a decision.

It is of moment to remember, that if the buyer finds out that the horse he has bought, is not what he considers he really should have got for his money, he should use proper diligence, as soon as he is certain that he has been wronged, in returning the horse to the seller, or in informing the seller that he had determined to rescind the sale (*b*), because if any article bought is not what the buyer expected or wanted, and he has been induced to purchase it through fraud or misrepresentation, the buyer is bound to return it or point out the defects as soon as possible. Much more is this the case in the purchase of live animals. A horse may catch a sudden cold or fever in the feet and become ill or go lame in a very few hours. To protect themselves against horses being returned after a certain lapse of time many large sellers, such as Messrs. Tattersall, require the horse, if ob-

(*b*) A warranted horse, if rejected, should be returned in reasonable time. Buller, J., in 1 T. R. 136, *Adam* v. *Richards*, 2 H. Bl. 573, *Street* v. *Blay*, 2 B. & Ad. 456.

jected to, to be returned within a specified number of days. When a horse was sold with a warranty by private sale, at a repository for the sale of horses, where the terms of the sale were painted upon a board fixed in a conspicuous position, a purchaser must be taken to be cognisant of these terms, though nothing is said respecting them at the time of sale, and if one of the terms is that the horse, being found to be unsound, must be returned within twenty-four hours, it must be complied with, though the unsoundness is of such a nature as may not be discovered within that time (*c*). No exact rule can be laid down, as to within how many days the return should take place. In country places, a veterinary surgeon may not be immediately at hand, or other unavoidable hindrances may occur. Generally, it may be said, that where a buyer objects to a horse he has purchased, he should notify such objection to the seller within eight days inclusive (*d*).

Assuming, then, this and the other steps before mentioned to have been taken, and that the party complaining does not know how to bring complaint in the county court, and does not wish to employ a solicitor, let us consider how he should

(*c*) *Bywater* v. *Richardson*, 1 Ad. & E. 508.

(*d*) Whatever may be the right of the purchaser to return a warranted article, he cannot do so if he has done more than was consistent with the purpose of trial (*Street* v. *Blay*, 2 B. & Ad. 456; *Chapman* v. *Gwyther*, 1 L. R., Q. B. 463). See also, on this, remarks of Baron Bramwell in *Head* v. *Tattersall*, p. 9, ante.

proceed. His best plan will be to enquire from the officers of the county court of the district in which he resides what to do, and they will give him every information, and will show him how to bring his action; they will also tell him the day and hour on which the action will be tried. Before the complainant goes to the county court office to lodge his plaint, he should commit to writing the particulars of his claim, for it is part of the statute law affecting county courts, that all claims of forty shillings (*e*) and upwards shall be explained by the complainant, adding thereto particulars, that is, by setting out in detail the several items constituting his claim. The claim then in this case we will suppose to be particularised in some such way, as thus:—

BROWN, plaintiff, *versus* SMITH, defendant.

The plaintiff claims from the defendant the sum of 25*l.* 10*s.* 0*d.*, on a breach of warranty, of which the following are the particulars:—

January, 1877.						
Cash paid defendant for brown horse.....					£10	0 0
Horse sold at Lewes market on Feb. 10th for			£17	0 0		
Deduct eight days' keep..	£1	4 0				
Veterinary Surgeon's Certificate.....	1	1 0				
Postage and other sums out of pocket.....	0	5 0				
			2	10 0		
					14	10 0
					£25	10 0

(*e*) Consolidated Orders, 1875, Order vii. 1.

The complainant should take three copies of these particulars, one he should keep for his own guidance, one other will be annexed to the summons (*f*) served on the defendant, and the third will be attached to the plaint filed in the court, and will be for the use of the judge who tries the case. It can readily be understood, how important it is, that these particulars should state the items of the demand in plain and simple terms. At the same time the complainant hands in these particulars, he should consider whether he requires his opponent to produce or show any letters which may have been written to him, and if he thinks such letters will be of value, he should give notice to the opposing party to produce them. As a rule, it is always wiser to give an opponent notice to produce all documents (*g*). These preliminaries being arranged, the complainant should consider what evidence and witnesses will be required to substantiate his claim, and if he thinks there are any who will not attend at the Court voluntarily, he can enforce their attendance by a subpœna. The officers of the Court will serve this if the address of the person wanted is given. The day for hearing the case having arrived, and the parties in Court, the complainant should have arranged in his mind the way he is going to tell

(*f*) Consolidated Orders, 1875, Order ii. 7.
(*g*) Consolidated Orders, 1875, Order xiii. 1.

his story. In Courts of justice there is nothing like bringing the facts forward, step by step. Many plaintiffs think because they know all about it, therefore, the judge does, and commence where they should end. In a dispute of the nature we are now supposing, the complainant should first say that wanting a horse he went to a fair, or to the defendant's stable, as the case may be, that he was shown a horse, that the price agreed on was 40*l.*, and that before he finally agreed to buy it he requested the defendant to warrant, which the defendant did in the manner and form in which the complainant alleged he did.

If there has been a written warranty the proof will be easy enough; because, as was said in a previous chapter, the decision of the court will depend upon the terms of the warranty, as expressed in writing (*h*), and the first really important step for the complainant to take in Court will be, to show that the warranty was written or made by the seller or his agent or servant. This can be done by the evidence of the person who saw the warranty written out, or who received it from the seller. In like manner, if the warranty given was by word of mouth, the complainant must prove that the horse was warranted to himself or his agent or servant, before the bargain was struck

(*h*) This need not be stamped, *Skime* v. *Elmore*, 2 Camp. 407.

and the horse sold—he then should prove payment of the price. The complainant should be very careful to be accurate in giving his evidence respecting the warranty, and to repeat the precise words used by the seller, for as has been shown before, there may be expressions which only amount to a representation and not to a warranty. A man may commend his goods as he pleases, and has a right fairly to puff them, whether a horse or other chattel; he may, in short, praise them as he likes so that he does not induce another person to buy by some statement of an alleged fact, which is untrue, and goes to the root of the bargain.

The next step will be to prove the breach of warranty, that is, that the horse was, at the time of sale, unsound, or vicious, or restive, or was not as stated in the written warranty, or, as the complainant alleges, the seller told him when he bought the animal. To do this he must call as a witness the veterinary surgeon, coachman or whomsoever it is he relies on, who saw the horse in dispute soon after it was bought, and get such witness to give his testimony respecting the animal's unsoundness, vice, or restiveness, as the case may be. The certificate or written opinion of anyone is of no use in court, except to correct evidence; it can be objected to, if by itself, for many reasons, if for no other because the person giving it has not been cross-examined. If anyone gives an opinion which should influence a Court of justice, he ought

to be required to give it, so as to be cross-examined upon it, and thus have the value of his evidence tested. After the veterinary surgeon or other authority has been examined, then the complainant should bring forward his evidence as to the price the horse sold for by auction, the expense he was put to in keeping the animal, and generally as to all the other items which make up his claim. If he can bring any witnesses to prove that the other side knew that the horse was not of the character or quality warranted; for instance, if the horse is found to be lame, anyone to whom the defendant or seller complained of the horse's previous lameness, would be an invaluable witness; or if it is found to be vicious, the evidence of any person to whom the defendant has admitted the vice while he owned the horse, or who has seen it do vicious acts when the defendant was present, because such evidence would be almost conclusive of fraud, and fraud, as lawyers say, vitiates everything, and proof of it will rescind any sale, whether there has been a warranty or not. After the plaintiff and his witnesses have finished their account of the transaction, the defendant is entitled to tell the court his version of the affair, and call his witnesses to rebut or deny the account given by the plaintiff, and, finally, the plaintiff may address the judge, or the jury if there is one, on the whole case; but nothing said by any advocate can make up for careful preparation of the evidence to be given,

and an accurate and truthful method of telling the story. After judgment is given, if the complainant recovers more than 20*l.*, he will have costs as a matter of course (*i*); but if he recovers a less sum than that, he should apply to the judge for his costs and the expenses of his witnesses.

These remarks are intended to be of service to defendants as well as plaintiffs in such like case, for it is evident that if a certain line of conduct is followed by the plaintiff, an opposite but similar line of defence should be followed by defendant.

If a written warranty is given, the only defence would be, either that the animal is still, or was, when action brought, in the same state or condition as it was when warranted by the document given, or that the breach of the warranty is the complainant's own fault; for instance, a horse may, immediately after being bought, be shod and thereby lamed, or it may be put in a conveyance with harness too small or improperly fitting, or the vice alleged may be brought about by fault of the buyer. If the warranty is not in writing and the defendant denies it, he should bring evidence to show exactly what was said; but the complainant must make out his own case first. The defendant will not be required to prove he did not warrant, until the complainant has made out a case showing that he did do so. Again, the defendant

(*i*) 30 & 31 Vict. c. 142, s. 5.

may show that the horse was not returned to him in due time, or that the sale by auction was not properly conducted, or not published, or, as before said, that there has been no breach of the warranty, that, in fact, the horse was sound when sold, or was quiet or free from vice or disease. In all these cases, whether on the part of the plaintiff or defendant, a simple statement of facts will be better than any technical or laboured address. County Court judges have ordinarily so short a time to dispose of cases, that when horse cases do arise, the man who tells his story in the most simple and straightforward manner, is more likely to be listened to.

If a party seeks to recover more than 20*l.* from his opponent, either side is allowed, whether plaintiff or defendant, in an action in the County Court (and it should be again noted that the remarks contained in this chapter will apply to either character), to administer interrogatories (*k*) or, in other words, to question the other side as to the nature or reality of the bargain, on any circumstance connected with the bargain or sale in dispute. For instance, let us suppose a person to have bought a horse from another, which, among other things was warranted to be quiet in harness, and the animal is found after purchase to be restive and a kicker; in that case the buyer might inter-

(*k*) Consolidated Orders, 1875, Order xiii. 6.

rogate the seller, and ask how long he had had the horse? whether he had ever put it in harness? whether he ever knew or heard of its kicking in harness before? and such like questions, which the seller would be obliged to answer on oath, and which would bind him to a certain statement, from which he could not depart in court, without materially damaging his side of the case before the judge. Interrogatories of this character can be taken out in the County Court in all cases, however small the sum; but as the costs of them are only allowed in cases above 20*l.*, it is not likely they will be taken out where the sum in dispute is of lesser value. The officers of the Court will show the complainant how to manage this (supposing him not to employ a solicitor), and the desirability of obtaining some such clue to the defence or case likely to be set up, is too plain to require further comment.

In horse cases the evidence will generally be conflicting, one party directly contradicting the other, not because necessarily one party is telling an untruth, but because from the nature of the case two persons will look at the same animal from a totally different point of view, one thinking much of a good old servant, or a favourite colt, until it has become a perfect quadruped in his eyes; the other, looking at the money he has parted with, and expecting his full money's worth, if not more, for the price he is giving. At the same time there

is something about horse dealing which has a debasing influence on many who have much to do with it, and Englishmen all over the world are supposed or suspected to be quite knowing enough on the subject. The motto on the title page of this work, taken from a letter of Cicero written many hundred years ago, may be freely translated thus: "You who think yourselves very clever, take care you are not done by British horse dealers;" from which it would appear that, even in those days, Englishmen had the character of sharpness in horse dealing, and that, moreover, this sharpness was not lessened by an over-abundance of means may also be inferred by another passage from the next letter of the same classic writer to the same person, where he says, in effect, "they are badly off in England,"—"*In Britanniâ nihil esse audio, neque auri neque argenti,*" a state not unknown to many rural horse dealers of the present day. Oddly enough, the best horses now driven in Rome are supplied by English dealers. It may then be taken for granted that from one cause or another the stories told by each party in a horse case are nearly certain to be contradictory, and although a judge may wish to avoid the responsibility of saying which story is the true one, as a rule it will be better to have horse cases tried by the judge of the court and not by a jury, or, if it were possible, by a judge and two assessors who know something about horses. A County Court

jury only consists of five men; there are few Englishmen who do not think they know all about horses, and amongst the five it is safe to say, there will be one such man who will try to lead his brethren and get them to adopt his view. In the conflict of evidence usual in horse cases, it requires a mind trained to weighing evidence, to discriminate between the true and false story. Juries of twelve are in this respect better than juries of five, for the former are less liable to be led by one man or to form hasty opinions; they take their cue in looking at the evidence from the judge's summing up, and, on consultation, usually come to a right conclusion on all simple questions of fact.

But whether the case is tried by a judge alone or before a jury, the class of evidence and the mode of procedure before advised will be the same. In all cases before the court, accuracy of statement and simple versions are most important; but more especially is this so in horse cases. The advice then offered to complainants is to tell their story quietly and plainly, speaking out distinctly but not noisily, and they will obtain, if wronged, full justice and redress in a County Court, and none the less acceptable because it will be speedy justice.

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